Petition

81-1941

NO.

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. PHILIP B. EATOUGH,

Petitioner,

v.

DR. EDWIN H. ALBANO, ET. AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where the New Jersey Board of Medical Examiners refuses "M.D." licenses to graduates of accredited American osteopathic medical schools whose education is conceded to be equal in substance and quality to non-osteopathic medical graduates and who limit their practice to AMA certified specialties and disavow all osteopathic principles, yet awards "M.D." licenses to medical students educated abroad who did not earn M.D. degrees and whose quality and type of training is conceded to be unknown to the Board, does the Board's licensing scheme violate the equal protection clause of the Fourteenth Amendment?

2. Where osteopathic and allopathic medical schools provide medical training equal in substance and quality, where the New Jersey Legislature recognizes graduates of both to be fully qualified, plenary physicians, where holders of M.D. degrees may have been fully osteopathically trained, and where osteopathic techniques may or may not be used by holders of either M.D. or D.O. degrees, is it rational to classify all qualified, plenary physicians into two groups based solely on their nominal degree?

3. Are the Board's licensing practice and regulations invalid where they require physicians to identify themselves by specified titles despite a statutory provision permitting the absence of any titles, and where they authorize wide forms of physician advertising expressly prohibited by the Statute?

PARTIES TO THE PROCEEDING

The petitioner is Dr. Philip B. Eatough, a physician, licensed to practice medicine and surgery in the State of New Jersey.

The respondents are members of the New Jersey State Board of Medical Examiners. They are: Dr. Edwin H. Albano, Ruth S. Ballou, Dr. Clarence Bookbinder, Dr. Jordan D. Burke, Dr. Enio J. Calluori, Dr. Arnold E. Cianciulli, Dr. Thomas C. DeCesio, Dr. Rudolph T. DePersia, Dr. Irving H. Plain, Dr. Joseph A. Riggs, Dr. James M. Rosser, Nicholas A. Sidoti, Theodore Simkin, Dr. Richard G. Stefanacci, Dr. Carl N. Ware. All were sued individually and as members of the State Board.

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Respondents.

Abraham Greenspan on behalf of Dr. Philip B. Eatough, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

Neither opinion of the court of appeals or the opinion of the district court are reported.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on March 1, 1982. A motion to stay the mandate was granted on March 24, 1982. (App.C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS, STATUTE AND BOARD REGULATIONS

First Amendment

The Congress shall make no laws . . . abridging the freedom of speech or of the press.

Fourteenth Amendment

No state shall make or enforce any law which shall abridge . . . nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 45:9-18 of the Medical Practices Act

Any person shall be regarded as practicing medicine and surgery within the meaning of this chapter, who shall use the words or letters "Dr.", "doctor", "professor", "M.D." or "M.B." in connection with his name, or any other title intending to imply or designate him as a practitioner of medicine or surgery in any of its branches, and who, in connection with such title or titles, or without the use of such titles, or any of them, holds himself as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity and physical condition, . . .

N.J.A.C. 13:35-4.1 Degree Designation Rule

A physician licensed to practice medicine and surgery in the State of New Jersey shall identify himself only by that degree designation (M.D. or D.O.) which is imprinted on the license issued to said peson by the Board; i.e. John Doe, M.D. or John Doe, D.O. or Dr. John Doe, M.D. or Dr. John Doe, D.O.

N.J.A.C. 13:35-6.13, Advertising Rule

(a) "Licensee" for the purpose of this regulation means a person possessing a plenary license to practice medicine and surgery, a podiatrist, a chiropractor, a physical therapist or a director of a bioanalytical laboratory.

(b) A licensee in the State of New Jersey may provide information to the public by publication in a dignified manner in newspapers or comparable written publications concerning: education, certification or appointments, location and availability of services, fees for routine professional services and other pertinent information about the licensee's practice. On any such publication, license degree must be designated. To the extent that information provided to the public by the licensee may be misleading, the licensee shall provide clarification, such as, but not limited to, whether additional charges may be incurred for related services when fees are stated.

STATEMENT OF THE CASE

This case concerns the constitutionality and statutory validity of certain practices and regulations of the New Jersey Board of Medical Examiners regarding the licensing of physicians. The New Jersey Medical Practices Act contemplates the same license for all plenary physicians, yet the Board has chosen to single out graduates of osteopathic medical schools for different treatment. Under the Board's licensing scheme, all "M.D." degree holders, and all foreign medical graduates regardless of their degree status, are awarded "M.D." licenses and required to hold themselves out to the public as M.D.'s. At the same time, graduates of osteopathic medical schools, although also entitled to plenary licenses, are nonetheless

denied the "M.D." designation, but are issued "D.O." licenses and required to hold themselves out as D.O.'s. Petitioner contends that this differential treatment constitutes a denial of equal protection. In addition, petitioner contends that the Board's licensing scheme is invalid since it contravenes numerous provisions of the New Jersey Medical Practices Act. N.J.S.A. 45:9-1 et seq.

Petitioner first filed suit in United States District Court, District of New Jersey, on May 14, 1979. The parties submitted the case to the Court on a set of stipulated facts, and agreed that all depositions, interrogatories and exhibits would be made part of the record. Oral argument was heard on October 27, 1980. On March 25, 1981, the District Court (Lacey, J.) found in favor of Appellee Defendant Board of Medical Examiners, Notice of Appeal was filed on April 16, 1981. On March 1, 1982, the Third Circuit affirmed, Weis, J. dissenting.

STATEMENT OF FACTS

Petitioner is a physician currently practicing medicine and surgery in Monmouth County, New Jersey. He was graduated from the Philadelphia College of Osteopathic Medicine with the degree of Doctor of Osteopathy (D.O.) in 1971, and thereafter completed five years of post graduate medical training at hospitals approved by the American Medical Association (AMA).

Petitioner's practice is and has been limited to the two areas in which he underwent specialized training: Internal Medicine and Cardiovascular Diseases. In 1976 he became board certified by the American Board of Internal Medicine and in 1979 he became a diplomate in Cardiovascular Diseases. Both boards are approved by the AMA. He is one of only nine AMA board certified cardiologists in Monmouth County. Petitioner never has and

does not now use any osteopathic manipulation techniques or principles in his practice.

Nevertheless, the custom and regulations of the New Jersey Board of Medical Examiners require petitioner to hold himself out to the public and advertise himself as a "D.O.". This requirement results from the combined operation of one Board custom and two specific Board regulations. Under regulations promulgated by the Board, physicians holding themselves out to the public must identify themselves by the degree imprinted on their license N.J.A.C. 13:35-4.1 ("Degree Designation Rule") and 13:35-6:13 ("Advertising Rule"). The Board's custom is to issue identical licenses to all qualified physicians, with one exception. The exception, conceded by the Board to be without express statutory authority, is the Board's custom of inscribing "D.O." after the names of graduates of osteophatic medical schools, rather than "M.D.", which is given to all others, including those who studied abroad without earning an "M.D." as such, or indeed any degree whatsoever. Accordingly, petitioner's license reads: "Philip B. Eatough, D.O."

The Board's custom results in essentially different licenses being issued to osteopathic graduates and graduates from all other so-called allopathic schools. This difference in treatment, however, cannot be justified on the basis of alleged differences between osteopathy and allopathy. The Board's custom of awarding "M.D." licenses to foreign medical graduates (FMG's) originated over two hundred years ago. Yet the terms "allopathy" and "osteopathy" did not come into currency until the end of the nineteenth century. Thus the osteopathic-allopathic distinction did not exist, even in theory, until over one hundred years after the Board's licensing custom began.

At first, the perceived differences between the two approaches were great. Indeed prior to 1939 New Jersey law severely restricted the practice of medicine by osteopaths, issuing only limited licenses which forbade osteopaths from using drugs and performing surgery. This coincided with the early perception of an osteopath as a "physician of a sort".

Whether the differences were truly so great, it is now widely recognized that there is essentially no difference in the medical education or philosophy between the two schools of medicine. As early as 1962 the state of California issued M.D. licenses to all D.O.'s, and in 1974 the Board of Trustees of the American Medical Association (AMA), recognizing that osteopathic medical schools provide the same medical education as is provided in schools granting the "M.D." degree, recommended, that all state licensing boards issue to osteopathic graduates, who complete a one year AMA approved residency, an "M.D." license. The New Jersey Legislature took note of this even earlier, when in 1939 it repealed the former restrictions on osteopaths, and provided that D.O.'s were fully qualified and competent in every respect to practice medicine and surgery. The District Court and the Court in the Third Circuit below expressly declared that the New Jersey Medical Practices Act itself makes no distinction between graduates of allopathic and osteopathic medical schools.

The Board, however, persists in maintaining such a distinction through the continued imposition of its licensing scheme. Yet, the Board concedes that osteopathic schools provide medical education that is equal in both substance and quality to allopathic medical schools. The osteopathic schools are subject to the same curriculum requirements applied to all approved and accredited medical schools. The instruction and the course content in each subject is the same, and the number of classroom and clinical hours is at least equivalent. The textbooks used in

osteopathic schools are the accepted medical texts in all subjects and fields of medical practice. While osteopathic schools require their students to take courses in osteopathic theory and manipulation, also known as biomechanics, these are often taken as electives in non-osteopathic schools.

While the Board denies "M.D." licenses to physicians who are conceded to have received equivalent education, the Board grants "M.D." licenses to foreign medical graduates when they pass the licensing examination, despite the tremendous variance in their educational backgrounds. The Board does this while admitting having no specific knowledge and information concerning the medical education at the foreign schools. Moreover, even though most foreign schools do not award Doctor of Medicine degrees, the Board automatically inscribes "M.D." on the licenses of FMG's.

The class of FMG's who did not earn "M.D." degrees can be divided into three groups. One group consists of those who attended foreign schools that simply do not grant the Doctor of Medicine degree. The Board admits that these individuals are not "M.D.'s". Nevertheless, all are awarded "M.D." licenses by the Board. The second group of FMG's consist of those who have not received a medical degree of any type, but who are licensed abroad upon receiving a foreign certificate. They, too, are issued licenses inscribed with "M.D." and are permitted to hold themselves out on the same terms as American graduates holding "M.D." degrees. The third group of FMG's consist of students who have returned to this country while remaining in student status. Under the "Fifth Pathway" program, they are permitted to leave their foreign schools after finishing only the required courses, and spend a fifth year in an AMA approved hospital undergoing clinical training not received abroad. Although they have no medical degree, the Board permits

them to use the suffix "M.D." and hold themselves out as "M.D.'s". When they complete their examinations, the Board issues them plenary "M.D." licenses.

Not only does the Board issue "M.D." licenses to FMG's who have no "M.D." degree, it does so while conceding that is does not know whether a particular FMG has been osteopathically or allopathically trained. The Board does not know whether osteopathic principles are taught abroad, and admits it cannot tell from course titles whether osteopathic approaches were covered. Instead the Board simply presumes that a foreign school is allopathic.

Although the Board admits lacking knowledge about the type of training given abroad, it concedes that by certain objective measures the *quality* of foreign medical education falls far below that of American medical schools. The Office of Education warned in a report in 1978 that the poor quality of foreign medical schools posed substantial dangers to the U.S. consumers of medical services.

As a result of the Board's licensing scheme petitioner was required to and did hold himself out to the public with the "D.O." designation when he began to practice. However, he came to believe that this designation caused confusion and misunderstanding about the nature of his practice. People coming to him for manipulations had to be told that he did not do manipulations, and does not believe in their use. At the same time, he felt that the public perceived him as not a qualified physician licensed to practice medicine and surgery. On at least two occasions, for example, former patients inquired of the Board whether petitioner was a "real M.D." because they wanted to be treated by a competent doctor; neither patient returned when told that he was a Doctor of Osteopathy, despite the Board's assurances that he was fully qualified.

Board members who testified agreed that the "D.O." label very often confused rather than informed the public about a physician's training and practice. Dr. Albano, president of the Board, testified that he did not think the public understood what the D.O. degree means. Dr. Stefanacci testified that members of the public with no prior experience with D.O.'s would have a difficult time understanding that a physician with a D.O. license was fully qualified to practice medicine and surgery. Instead, they would take the D.O. label as a signal of the licensee's lesser competence as compared to a holder of an M.D. degree. Non English speakers in particular, would have a hard time understanding what D.O. meant. According to Dr. Albano, solely because of the "D.O." label petitioner is placed at a disadvantage with the public as compared to a similarly trained physician allowed to use "M.D."

In order to develop his practice in his particular specialties—internal medicine and cardiovascular diseases—and in order to avoid the negative reactions attending a medical philosophy in which he does not believe, petitioner began to identify himself with the inscription "M.D." in signs, on his letterhead and in various public listings. It was already the policy of New Jersey's Department of Motor Vehicles to issue all licensed physicians automobile license plates with "M.D." Moreover, petitioner's certificate from the American Board of Internal Medicine, which he displays in his office reads: "Philip Bradley Eatough, M.D."

Petitioner made a written request to the Board that he be issued a new license with the suffix "M.D.", but the request was refused. When the Board insisted that he cease using the "M.D." designation, he sent a letter of compliance, because he feared the loss of his license and a fine, although he did not cease using "M.D." in his practice. When it became clear that he would be subject to

disciplinary proceedings, he filed this lawsuit on May 14, 1979.

Subsequent to the initiation of the suit, the Board in September 1979 proposed to change the "Degree Designation Rule" and invited comments by mail. The new rule would have permitted all licensed physicians to identify themselves with the designation "Dr." preceeding their name, coupled with an indication either of their plenary licensure (e.g. licensed to practice medicine and surgery) or practice specialty (e.g. internal medicine). In addition the new rule made the use of a degree abbreviation wholly optional (*i.e.*, "M.D." or "D.O."). Finally the new rule prohibited all newly licensed FMG's from using the designation "M.D." Upon receipt of hundreds of opposition letters, mostly from FMG's and students studying abroad, the Board withdrew the proposed rule.

REASONS FOR GRANTING THE WRIT

1. Certiorari Should Be Granted Because The Decision Below Is In Conflict With A Decision Of The Three Judge District Court In *Oliver v. Morton*, 361 F.Supp. 1262 (N.D. Ga. 1973).

As a result of the decision by the Court below there are now two conflicting decisions on the same set of facts affecting equal protection rights of licensed physicians in many states.

The issue raised in this case is whether New Jersey's scheme for granting foreign medical graduates, who have never earned the "M.D." degree, a license with the "M.D." designation, while denying such a license to petitioner, who also does not have the "M.D." degree, but has the "D.O." degree, is a violation of equal protection. The majority below found no violation. However, the *Oliver* Court in dealing with exactly the same question came to the opposite conclusion and stated:

> "—the state cannot differentiate between two qualified physicians who have not earned an M.D. degree and allow one to parade under an unearned M.D. degree while refusing to allow the other to do so. The state has failed to show the court any reasonable basis for its differing treatment of foreign trained physicians and D.O.'s. The two are similarly situated; without a rational basis for the distinction, the State's differing treatment of foreign-trained physicians and D.O.'s is arbitrary and in violation of the Equal Protection Clause."

Accordingly the *Oliver* Court found the entire licensing scheme invalid.

In 1981 the same question was put before the Missouri State Court, in the unreported case of *The State Board of Registration of the Healing Arts v. Giffen,* Case No. CV 679-98 CC.* The Missouri licensing scheme was the same as that in New Jersey. The Missouri board brought an action against Giffen, a "D.O." because he was using the "M.D." designation. In finding a violation of equal protection the Missouri Court stated:

> "Enforcement of sec. 334.047.2 RS Mo. (1978), so as to require defendant to designate that degree he earned and not to permit defendant to use the designation "M.D." to simply show that defendant's training is the equivalent of one holding an "M.D." degree while permitting foreign trained physicians who do not hold "M.D." degrees or degrees which readily translate into "M.D." or "Doctor of Medicine" to use the "M.D." designation is a violation of defendant's right to equal protection of laws as guaranteed by the 14th Amendment to the Constitution of the United States. . . . "

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*Copies of the opinion have been lodged with the Clerk.

The majority below did acknowledge that it was unfair and unwise not to permit petitioner to use "M.D." in his practice while permitting foreign medical graduates to do so.

The issue before the Court is of great importance. If the judgment below stands, the petitioner will be unable to inform the public that he is a physician practicing internal medicine and cardiology. There are other states with similar rules, including California, Colorado, Illinois, Indiana, Kentucky, Missouri, Ohio and Texas and to allow this decision to stand will be a signal to them to deny the equal protection rights due the petitioner.

2. The Fourteenth Amendment To The Federal Constitution Does Not Permit a Scheme Whereby A State Licensing Board May Make An Irrational Classification Of Fully Licensed Physicians Into Two Classes Serving No Legitimate Articulated State Purpose.

The Board's practice is to issue the same license to all physicians except that graduates of osteopathic medical schools receive the license with the "D.O." designation and all others receive the license with the "M.D." designation. Since the Medical Practices Act N.J.S.A. 45:9-1 et seq. makes no classification of physicians, the Board's act of arbitrarily classifying physicians as either "M.D." or "D.O." is a violation of equal protection and state law. So long as the board issues "M.D." licenses to FMG's who do not have the "M.D." degree and whose medical education does not compare favorably with that of American medical schools which grant the "M.D." and "D.O." degrees, the Board cannot deny petitioner such a license. The Board concedes it has no statutory or regulatory authority to inscribe medical licenses with the letters "M.D." or "D.O.", yet they have threatened to discipline petitioner for not using the "D.O." designation in his practice.

The Court's initial task in equal protection analysis is to determine the legitimate state interest underlying a challenged classification. In making this determination, courts refuse to accept at face value any and all purported objectives advanced in defense of a statute. *Thompson v. Gallagher,* 489 F.2d 443, (5th Cir. 1973).

The Supreme Court has laid down two broad principles. First, courts should confine themselves to the "articulated" or "stated" purposes underlying a statute and refrain from supplying "imaginary" bases which might conceivably justify it. *Johnson v. Robison,* 415 U.S. 361 (1974). Second, a purported statutory aim must be rejected if the challenged classification is a poor means of attaining it. If there is no substantial relation between the statutes and their purported objectives, this may well indicate that these objectives were not the statute's goals in the first place. *Orr v. Orr,* 440 U.S. 268, (1979).

Numerous goals were advanced to defend the Board's classification, all falling under the broad rubric of "informing the public". They are as follows: (1) to publicize the physician's actual academic degree earned; (2) to distinguish between allopathically and osteopathically trained physicians; and (3) to indicate the allopathic or osteopathic orientation of the physician's current practice. In view of the Supreme Court's criteria, however, it is clear that none of these proffered goals are the actual objective of the classification scheme.

The validity of the first purported objective, to publicize the actual degree earned, is belied by the Board's treatment of FMG's. The Board issues "M.D." licenses to foreign graduates who the Board concedes either have a medical degree different from "Doctor of Medicine" or who have no medical degree as such, or indeed have no degree of any sort. Since there is no connection between the classification scheme and the purported goal of

publicizing degrees, the goal must be rejected, in light of *Orr v. Orr, supra.*

The second and third purported goals center on the need to distinguish not among academic degrees, but between the allopathic and osteopathic philosophies of medical practice. According to these justifications, FMG's are granted "M.D." licenses because of their presumed allopathic training, as distinguished from a D.O.'s osteopathic education. The Board's treatment of FMG's simply cannot stand in light of the history of the Board's practice since the Board has bestowed "M.D." licenses on FMG's for more than 160 years before osteopathic graduates became licensed to practice medicine and surgery.

Indeed, in light of its history, the most plausible account of the classification's original purpose is that "M.D." was intended *generically* to aid the public in identifying physicians, and to eliminate the proliferation of confusing and meaningless foreign degrees. *Oliver v. Morton, supra.*

Given this aim, the Board's persistence in denying the "M.D." label to osteopathic graduates is clearly impermissible.

In sum, none of the objectives of the Board's classification scheme can plausibly be viewed as the actual, articulated goal of the scheme. The most plausible purpose of the historic practice is to assign all fully qualified doctors a common generic label regardless of their precise earned degree. In view of this, there is simply no justification for denying persons with "D.O." degrees the use of the "M.D." label.

The Board claims that only those physicians who have received an allopathic medical education are issued "M.D." licenses and those who have received an osteopathic medical education are issued a "D.O." license.

The Board's classification is arbitrary and unreasonable for three reasons. First, if the test for receiving a license with the designation rests upon having received an allopathic medical education, then petitioner must be granted such a license. The Board concedes that petitioner's medical education included the entire medical curriculum and course of study of an American medical school that grants the degree of "M.D.". An osteopathic medical school affords its students all the prerequisites of an "M.D." degree, *New York State Osteopathic Medical Society Inc. v. Allen,* 26 N.Y. 2d 20, 308 N.Y. Supp. 2d 342 (1970). Because petitioner took courses in osteopathic principles, in addition to his allopathic medical training, the Board claims he cannot hold himself as allopathically trained, yet the Board admits that American medical schools that grant the "M.D." degree also offer courses as electives in "biomechanics" which courses are the same as those described as osteopathic principles. Even though FMG's may have taken these additional courses they are not considered different and are issued "M.D." licenses.

3. The Fourteenth Amendment To The Federal Constitution Does Not Permit A Scheme Whereby A State Medical Board May Enact An Irrational Classification Of Physicians In Contravention Of The Statute.

New Jersey's regulations N.J.A.C. 13:35-4.1 and 13:35-6.13 were drafted on the theory that a state administrative agency, the Board of Medical Examiners, may adopt rules specifying that a physician must identify himself in the practice of medicine and surgery by the letter designation imprinted on the license issued by said Board, and a physician failing to comply with these rules may be disciplined. The Board's scheme of licensing physicians as either "M.D." or "D.O." is a violation of equal protection, *Oliver v. Morton, supra.* The equal protection provisions of the Federal Constitution apply to actions

taken by administrative departments of local governments, *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163(1972), and an agency of the state denies equal protection when it treats persons similarly situated differently under the law, and this difference may be created by a grant as well as by the imposition of a burden. The courts in New Jersey have consistently held that the Medical Practices Act makes no distinction between physicians. Physicians with the "D.O." degree must be accorded the same rights and privileges as are accorded physicians who have earned the "M.D." degree, *Griesman v. Newcomb Hospital,* 40 N.J. 389, 192 A.2d 817 (1963).

Judge Weis in his dissent below stated that the Board's classification scheme promotes deception rather than the information concerning the medical education of a physician. The "M.D." and "D.O." designations do not assist the public in making an intelligent and wise choice of a medical doctor. The designation can only lead the public to believe that all foreign medical graduates with "M.D." designation are equally trained graduates of American medical schools, and are "real doctors" whereas those with the "D.O." designation are not as well qualified and are not "real doctors". This arbitrary and unreasonable classification not only injures petitioner, but misleads the public into believing that each and every physician with the "M.D." designation is better qualified than the petitioner, since he lacks the "M.D." designation. So long as FMG's, who do not have the degree of Doctor of Medicine (M.D.), are permitted to parade as "M.D.'s", it is arbitrary and unreasonable not to permit petitioner to use the letters "M.D." in his practice, *Oliver v. Morton, supra.*

The majority below agreed with petitioner and stated, that so long as foreign medical graduates are permitted to use "M.D." then it is unwise and unfair to deny him the right to do so.

The Board's attempt to deny petitioner the right to use the designation "M.D." is a means of restricting petitioner in the way and manner of soliciting patients, and the denial of the use of the "M.D." designation, would restrict his ability to compete and to pursue his lawful occupation and profession. While no one has the right to practice medicine without having the necessary qualifications of learning and skill, which the state may require, so long as the requirements are appropriate there can be no objections to their validity. Petitioner has met all of the requirements for licensure, however requirements, which have no relation to the necessary qualifications, are not to be imposed on petitioner. He cannot be compelled to identify himself differently from those FMG's who also do not have an "M.D." degree, *Dent v. West Virginia,* 129 U.S. 114 (1889). Discrimination in a state statute must be based on differences that are reasonably related to the purposes of the statute, *Morey v. Doug,* 354 U.S. 457 (1957). In all equal protection cases the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment, *Police Dept. of Chicago v. Mosely,* 408 U.S. 92 (1972), and a deliberate and arbitrary discrimination or inequality in the exercise of regulatory power, not based upon differences that are reasonably related to the lawful purposes of such regulation, violates the 14th Amendment, *Muhammad Ali v. Division of State Athletic Comm.,* N.Y. 316 F. Supp. 1246 (S.D.N.Y. 1970).

Except for the first few months of his practice, petitioner has been and continues to use the "M.D." designation. If the decision below is not reversed, petitioner will be compelled to use the letters "D.O.". As a result his professional life will be destroyed, and those patients who trust and rely on his professional skills and competence as a cardiologist will leave, because the "D.O." label is a symbol of one who is not a "real doctor". So long as

foreign medical graduates who also do not have the M.D. degree are permitted to use the "M.D." designation, denying petitioner the same right is a violation of equal protection under the Federal Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A
Opinion Below — Dissenting Opinion of Weis, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1717

DR. PHILIP B. EATOUGH, JR.,
Appellant

v.

DR. EDWIN H. ALBANO, DR. RUTH S. BALLOU, DR. CLARENCE BOOKBINDER, DR. JORDAN D. BURKE, DR. ENIO J. CALLUORI, DR. ARNOLD E. CIANCIULLI, DR. THOMAS C. DE CECIO, DR. RUDOLPH T. DE PERSIA, DR. IRVING H. PLAIN, DR. JOSEPH A. RIGGS, DR. JAMES M. ROSSER, NICHOLAS A. SIDOTI, THEODORE SIMKIN, DR. RICHARD G. STEFANACCI, DR. CARL N. WARE, individually and as members of the New Jersey State Board of Medical Examiners

(D. C. Civil No. 79-1421)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 1, 1982
Before: GIBBONS, WEIS and GARTH, *Circuit Judges*
(Filed March 1, 1982)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

This appeal presents a federal constitutional and a state statutory challenge to certain regulations and practices of the New Jersey Board of Medical Examiners regarding the licensing of physicians. These regulations and practices have prevented the appellant, Dr. Philip B. Eatough, Jr., a Doctor of Osteopathy (D.O.) and Board licensed physician, from holding himself out to the public as an M.D. Eatough contends that this results in a violation of the United States Constitution and of the New Jersey statutes governing medical practice. The district court rejected these claims. We affirm.

I

Osteopathy, as a distinct approach to medical treatment, arose in the latter part of the nineteenth century in the mid-western United States.[1] The osteopathic approach — as opposed to allopathy, the more widespread approach adopted by the majority of physicians in this and other countries — stresses a view of the human organism as a self-regulating and self-healing whole. In emphasizing the interdependence and interrelatedness of bodily systems, osteopathy tends to employ surgery and drug treatments less frequently than does allopathy. Instead, there is a more frequent use of techniques of "bio-mechanics" to manipulate the neuromusculoskeletal system in order to return the various bodily systems to their naturally harmonious state.

There are presently fourteen osteopathic medical schools in the United States, all accredited by the American Osteopathic Association. The parties have stipulated that accredited osteopathic schools provide medical education equal in substance and quality to that provided by non-osteopathic schools. The subjects taught, and the content of those subjects, are the same in both types of schools (with equal numbers of classroom hours in the basic sciences and clinical work), except that osteopathic medical students are required to take, in addition, courses in osteopathic theory and manipulation (which courses may be electives in non-osteopathic schools). In New Jersey, for example, students of the Rutgers Medical School and those of the New Jersey School of Osteopathic Medicine (both are part of the University of Medicine and Dentistry of New Jersey) attend the same classes and labs in basic sciences for the first two years,

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1. The parties submitted the case to the district court on a set of stipulated facts and agreed that all depositions, interrogatories and exhibits would be made part of the record.

while students in the latter are also required to take courses in osteopathic manipulation.

Manipulative medicine is practiced and is the subject of textbooks by both M.D.'s and D.O.'s. D.O.'s are on the faculties of many American medical schools that grant the M.D. degree, and D.O.'s are accepted with the approval of the American Medical Association (A.M.A.) into internships and residencies in A.M.A. approved hospitals. D.O.'s presently may join, and are members of, county and state medical societies as well as the A.M.A.

Licensing of persons to practice medicine in New Jersey is governed by the New Jersey Medical Practices Act, N.J. Stat. Ann. §§45:9-1 to 9-27.9. (West 1978). Statutory licensing requirements, Sections 9-6 to 9.14, are the same for all current applicants (regardless of medical school attended) and do not distinguish between graduates of allopathic and osteopathic schools for licensing purposes. New Jersey legislative policy has been to recognize graduates of osteopathic medical schools as fully competent in every respect to practice medicine and surgery.[2]

Under Section 9.2, the State Board of Medical Examiners "shall make and adopt all necessary rules, regulations and bylaws not inconsistent with the laws of the State or of the United States, whereby to perform the duties and to transact the business required under the provisions of this article (section 45:9-1 et seq.)." Eatough objects to a practice of the Board and to two related rules promulgated by it. The Board's practice has been to issue the same license to all physicians (regardless of

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2. *See* N.J. Stat. Ann. §§45:9-5.1, 9-13. This contrasts with the New Jersey statutory prohibition on holders of licenses to practice osteopathy — as opposed to licenses to practice medicine and surgery — from prescribing or administering drugs and from performing surgery. N.J. Stat. Ann. §45:9-14.3. Section 9-14.3, while not repealed, is no longer applicable to osteopaths licensed to practice medicine and surgery.

what medical school they attended), but to add the suffix D.O. to the names of all graduates of osteopathic medical schools, while employing M.D. for the graduates of other medical schools. There is no express statute or rule that authorizes the inscription of these suffixes on the license of any physician in New Jersey. A "Degree designation" rule passed in 1971 reads:

> A physician licensed to practice medicine and surgery in the State of New Jersey shall identify himself only by that degree designation (M.D. or D.O.) which imprinted [sic] on the license issued to said person by the board; for example, John Doe, M.D., Joe Doe, O.D. [sic], Dr. John Doe, M.D. or Dr. John Doe, D.O.

N.J.A.C. 13:35-4.1. And a rule governing "Provision of information to the public" passed in 1978 provides, in pertinent part:

> A licensee in the State of New Jersey may provide information to the public, by publication in a dignified manner in newspapers or comparable written publications concerning: education, certification or appointment, location and availability of services, fees for routine professional services and other pertinent information about the licensee's practice. On any such publication, license degree must be designated. . . .

N.J.A.C. 13:35-6.13(b).

In addition to his challenge of this practice and related rules, Eatough objects to the way the Board has chosen to treat graduates of foreign medical schools (FMG's). FMG's may receive a license in much the same way as graduates of schools in this country: *e.g.*, by pass-

ing the Federation Licensing Examination (FLEX) (N.J.A.C. 13:35-3.1) or by endorsement after being first licensed to practice in another state (N.J.A.C. 13:35-3.2 and 3.3). *See* N.J. Stat. Ann. §45:9-8.[3] Although the Board may have no specific information concerning the medical education at these foreign schools, when it issues medical licenses to FMG's, the Board imprints the M.D. suffix.

Eatough graduated from the Philadelphia College of Osteopathic Medicine with the degree of Doctor of Osteopathy in 1971. He thereafter completed a one year internship and two year residency in internal medicine at St. Michael's Medical Center in Newark, New Jersey. In April of 1972, he was licensed to practice medicine and surgery in the State of Missouri, and in 1973, he was licensed by endorsement of his Missouri license to practice in New Jersey. He has also become a Diplomate in Internal Medicine, certified by the American Board of Internal Medicine in 1976, and a Diplomate in Cardiovascular Diseases, having passed all required exams of the American Board of Cardiovascular Diseases by 1979. He is affliated with two A.M.A. hospitals in New Jersey: Riverview in Red Bank and St. Michael's Medical Center in Newark. His practice is limited to the two specialties for which he has been trained: internal medicine and cardiovascular diseases.

Eatough asserts that he never has and does not presently employ any osteopathic manipulative techniques or principles in his practice. When he first began to practice, he used the degree designation D.O., but

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3. There is also a so-called "Fifth Pathway" program designed to permit a select number of United States citizens studying in foreign schools who leave after completing all of the required courses there, but without receiving a medical degree, to do a fifth year in an A.M.A. approved hospital here. After this fifth year of additional clinical training, these students may enter an approved internship and then take the FLEX exam.

after coming to believe that the public did not perceive him to be a qualified physician, he substituted the M.D. suffix in his practice (*e.g.*, in the telephone directory and on office signs). When he made a written request through his attorney that a new medical license be issued to him with the M.D. suffix thereon, however, the Board refused.

In March of 1979, two of Eatough's patients wrote the Board to inquire whether appellant was an M.D. or an Osteopath and informed the Board that appellant was using the M.D. suffix. Although the Board responded that, as a Doctor of Osteopathy, appellant held the same license as an M.D. with all the rights and privileges to practice medicine and surgery in New Jersey, these two patients stopped seeking his services.

Following this correspondence, the Board wrote to inform Eatough that he was violating their Degree Designation rule and that he was subject to discipline unless he ceased using the M.D. suffix. Fearful of loss of his license and a fine, he sent the Board a letter of compliance, but continued to use the designation M.D. When the Board learned of this, it wrote him another letter, giving him thirty days to correct all materials used in his practice identifying him as an M.D. Eatough still refused to comply, and filed this suit in the district court on May 14, 1979.

Eatough's complaint alleges violations of his federal constitutional rights under the first amendment, and under the due process and equal protection clauses of the fourteenth amendment, as well as violations of the New Jersey Medical Practices Act. The district court found against him on all his claims. On appeal he asserts only his equal protection claim and certain state statutory claims.

II

Eatough raises two state law claims. First he argues that the rules cited earlier concerning degree designation and providing information to the public contravene the Medical Practices Act which provides:

> Any person shall be regarded as practicing medicine and surgery, within the meaning of this chapter, who shall use the words or letters "Dr.", "doctor", "professor", "M.D.", or "M.B." in connection with his name, or any other title intending to imply or designate him as a practitioner of medicine or surgery in any of its branches, and who, in connection with such title or titles, or without the use of such titles, or any of them, holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall either offer or undertake by any means or methods to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition. The provisions of this chapter shall apply to all persons professing and attempting to cure disease by means of the so-called system of "faithcurism", "mind-healing", "laying-on-of-hands", and other similar systems.

N.J. Stat. Ann. §45:9-18 (West 1978). The fact that this section makes reference to people practicing medicine without the use of titles in no way implies that such behavior must be allowed. As the last sentence of the section makes clear, the purpose of the section is to subject all persons acting like physicians to the requirements of the Act, including the licensure requirements. Thus the promulgation by the Board of the rules at issue does not conflict with this section.

Eatough also argues that the challenged rules contravene the Act by authorizing forms of advertising not allowed by N.J. Stat. Ann. §45:9-16(j). The Board

counters by pointing to a 1978 amendment to the Act specifically permitting:

> A directory of physicians for consumer use which shall include the educational background, degrees, fellowships, certifications, specialties, experience and any other pertinent information which is related to the practice of medicine and surgery of the physicians.

N.J. Stat. Ann. §45:9-16(j)(g) (West Supp. 1981-82).

We fail to understand Eatough's challenge in this respect to the "Degree designation" rule, N.J.A.C. 13:35-4.1. Specifying that a licensed physician "shall identify himself only by" a certain degree designation does not itself authorize any form of advertising.

While we do understand Eatough's argument with respect to the rule concerning advertising, N.J.A.C. 13:35-6.13(b), we need not decide whether, for example, the newspaper advertising permitted by that rule can be interpreted to fall within the language of the 1978 amendment to the Act. Eatough's argument amounts to a contention that because the rule contravenes the statute in some respect, it must be considered a nullity with no application to anyone, including himself. Implicit in this argument is the contention that the rule cannot be limited or severed in such a way so as to make its application to him valid. Eatough, however, has offered no reason why we should declare a state regulation void when its application to him — *i.e.*, preventing any advertising by him without a D.O. designation — is otherwise valid. Without any indication that New Jersey case law prohibits severability, there is no reason why we should enjoin the rule's otherwise valid application to him.

III

Our rejection of his State law claims requires that we address Eatough's constitutional claims. He contends that the Board has violated the equal protection clause in two respects. On the one hand, it is urged that the Board's practice and regulations requiring appellant to employ only D.O. when holding himself out to the public as a physician constitutes an arbitrary and irrational form of discrimination between holders of M.D. degrees and holders of D.O. degrees that does not further any legitimate state interest. Secondly, Eatough contends that the Board's policy of issuing M.D. licenses to FMG's (and thus allowing them to hold themselves out as M.D.'s) arbitrarily favors FMG's over holders of D.O. degrees.

It is long settled that states have a legitimate interest in regulating the practice of medicine. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 827 (1975); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Dent v. West Virginia*, 129 U.S. 114, 122-23 (1889). In this case, both the Board and the district court, No. 79-1421, Slip Op. at 9 (D.N.J. March 25, 1981), have articulated what is certainly a legitimate state interest purportedly served by the Board's practice and rules: allowing the public to make an informed choice among physicians.

The application of the equal protection clause in the context of such a legitimate interest has been discussed often, and recently, by the Supreme Court. Since no one contends that the Board's rules are burdening either a "suspect class" such as a racial or ethnic group or a "fundamental interest" such as voting — this being an example, rather, of ordinary social and economic regulation — the constitutional standard for assessing equal protection is concededly the "rational relation test." The Court's reluctance to overturn such legislative activity is exemplified in such recent articulations of this standard as "we will not overturn such a statute unless the vary-

ing treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational," *Vance v. Bradley*, 440 U.S. 93, 97 (1979); and "the Equal Protection Clause is satisfied by our conclusion that the . . . Legislature *could rationally have decided* that [the legislative means at issue] might foster [the concededly legitimate state purpose]" (emphasis in original), *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4114 (U.S. Jan. 20, 1981).[4]

Applying the rational relation test, the district court noted both that the distinction between osteopaths and allopaths was created not by the Board, but by the two schools of medicine; and that the parties were in agreement that some patients seek out D.O.'s precisely in order to obtain the manipulative treatment such physicians ordinarily offer. Slip Op. at 9. Since the Board's practice and rules distinguishing between M.D.'s and D.O's afford the public at least some aid in making their informed choices among physicians, we must concur with the district court, *id.*, that there exists a rational re-

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4. It is not the case, as Eatough argues, that the defendants are confined to relying upon "articulated" purposes in fact underlying the statute. In *U.S. R.R. Retirement Bd. v. Fritz*, 49 U.S.L.W. 4035, 4039 (U.S. Dec. 9, 1980), the Court stated that "this Court has never insisted that a legislative body articulate its reasons for enacting a statute." Cases cited by appellant do not support the converse: *Johnson v. Robison*, 415 U.S. 361, 376 (1974) (Congress had, as is usually not the case, revealed its express objectives and no other objective was claimed); *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) (district court ordered not to discard a clear and legitimate purpose when it had perceived another purpose to be primary and found an equal protection violation based upon that purpose).

Nor is it the case, as Eatough also urges, that the purported purpose must be rejected if the challenged classification is a poor means of attaining it. The case they cite, *Orr v. Orr*, 440 U.S. 268, 280 n.10 (1979), involves a discussion of the more severe "substantially related" requirement found in gender discrimination cases.

lationship sufficient to pass muster under the equal protection clause. *See also Oliver v. Morton*, 361 F.Supp. 1262, 1268 (N.D.Ga. 1973). That some physicians such as appellant may not offer the services that their degree designation would lead one to expect does not make the Board's rules irrational. Only where we had some reason to infer "antipathy," *Vance, supra*, 440 U.S. at 97, on the part of the Board against D.O.'s, would we be inclined to demand a tighter "fit" between the means and ends in this case.

The district court held that the meager evidence offered by the appellant indicating the low esteem in which osteopaths may be held by the public was not convincing. Slip Op. at 10. Moreover the New Jersey legislative and Board policy is to afford graduates of osteopathic schools the same rights and privileges as M.D.'s. There is no reason on the record to subject the Board's actions to a stricter scrutiny than the rational basis standard of review requires.

Eatough also complains that the Board's practice of granting FMG's licenses with the M.D. suffix works an arbitrary discrimination with respect to D.O.'s. For this proposition, he cites *Oliver v. Morton*, *supra*, 361 F.Supp. at 1269, in which the district court explained that the Georgia Board's reasons for granting FMG's an M.D. license — that the foreign degree is substantially equivalent to the M.D. degree and that the names given most foreign degrees have little meaning to most people in Georgia — were nearly identical to the plaintiff's arguments in favor of being permitted to refer to himself as an M.D. rather than a D.O. Since the Georgia Board's policy was found to treat these similarly situated groups differently without a rational basis for that distinction, the court enjoined the Board from refusing to issue the plaintiff a license bearing the M.D. designation so long as they granted such licenses to foreign-trained physicians without M.D. degrees.

The district court declined to follow the *Oliver* court on this point, Slip Op. at 9-10, and so do we. The Board's practice of issuing M.D. licenses to FMG's, but not to graduates of osteopathic schools, is a classification distinguishing between these two groups. Once again, however, the Board has explained that its purpose is to inform the public, and we cannot conclude that the means chosen are not rationally related to that end.

It is New Jersey policy to issue licenses to practice medicine to the graduates of foreign schools once they have passed certain examinations (*e.g.*, the FLEX exam and an exam given by the Educational Commission on Foreign Medical Graduates). The wisdom of that policy is not at issue here. Medical schools around the world grant degrees with a large variety of names (*e.g.*, Ireland — "M.B.B.S."; Norway — "Candidate in Medicine"; Spain — "Licentiate in Medicine & Surgery"). The Board policy of issuing M.D. licenses to all these graduates is rationally related to the purpose of allowing the public to make an informed choice among physicians, insofar as many of the foreign degree names might only serve to confuse those seeking a physician.[5] And since there are no FMG's eligible to practice in New Jersey that come from a school identified with osteopathy, rather than allopathy, the distinction between M.D.'s and D.O.'s is rational in light of the previously mentioned purpose to inform patients of those physicians with os-

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5. Neither the factual accuracy of this reasoning, nor its political wisdom, is for us to question. As the Supreme Court stated recently in *Clover Leaf Creamery*, *supra*, 49 U.S.L.W. at 4113,

> But States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, *supra*, 440 U.S. at 111.

teopathic training. *See Maceluch v. Texas State Board of Medical Examiners*, No. CA-3-77-1498-G (N.D. Tex. July 10, 1981).

We can sympathize with the situation of Dr. Eatough who, having decided to abstain from practicing according to principles of osteopathy, nevertheless must suffer from the misunderstanding of some numbers of the public concerning his educational background. We might conceivably even question the wisdom or fairness of not allowing him to hold himself out as an M.D. while permitting the graduates of foreign medical schools, whose programs may not have been thoroughly evaluated, to do so. Our role as a court applying the equal protection clause, however, is limited in this case to evaluating whether there is some reasonable basis for finding that the distinctions employed further a legitimate state purpose. Since we have concluded that such a rational basis exists, we cannot find that the Board's practice and rules violate his rights to the equal protection of the laws.

IV

The judgment appealed from will be affirmed.

WEIS, *dissenting*.

As the majority points out, New Jersey's present legislative policy recognizes graduates of osteopathic medical schools as fully competent in every respect to practice medicine and surgery. This legislative policy was underscored nearly two decades ago by the New Jersey Supreme Court when it discredited "the notion that doctors of osteopathy are merely cultists and may not safely be permitted to associate with doctors of medicine. . . ." *Greisman v. Newcomb Hospital*, 40 N.J. 389, 403, 192 A.2d 817 (1963). The defendants conced-

ed in the district court that "each accredited osteopathic medical school provides medical education, which is equal in both substance and quality to that which is provided in a non-osteopathic medical school."[1]

In 1939, the legislature amended the Medical Practices Act so that "the practice of medicine and/or surgery shall be deemed to include, *inter alia*, the practice of osteopathy." N.J. Stat. Ann. §45:9-5.1 (West 1978). The Board did not respond to the legislative judgment with ungrudging acceptance. Even though its authority is restricted to the issuance of a "license . . . to practice medicine and surgery," N.J. Stat. Ann. §45:9-16, the Board still requires that the degree designation of "M.D." or "D.O." be imprinted following the physician's name on each license — a practice not contemplated by the statute, or authorized by any rule.

The Board has compounded the discredited distinction between the two types of practitioners by enforcing a "Degree Designation Rule," N.J.A.C. 13:35-4.1, as well as an "Advertising Rule," N.J.A.C. 13:35-6.13. The former regulation provides that "a physician licensed to practice medicine and surgery in the State of New Jersey shall identify himself only by that degree designation (M.D. or D.O.) which imprinted [sic] on the license. . . ." Similarly, Rule 13:35-6.13, which regulates advertising and solicitation, directs that in any publication providing information to the public, the physician designate his "license degree." Thus, the Board's licensing practice and rules perpetuate a distinction between allopathic and osteopathic physicians which the enabling statute does not authorize, and, indeed, was intended to eliminate.

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1. The district court observed, "the New Jersey College of Osteopathic Medicine and the New Jersey College of Medicine share the same facilities for instruction in the basic sciences during the first two years. They share the same rooms, labs, and instructors, and the examinations are the same."

As justification for its Advertising Rule, the Board cites the provisions of a 1977 New Jersey statute, N.J. Stat. Ann. §45:9-16, in which the legislature specified approved forms of advertising by license holders and required that their "professional degree" be included in publications, listings and signs. This statute — whose constitutionality is doubtful because it restricts professional advertising, *see In re R.M.J.*, —— U.S. ——, 50 U.S.L.W. 4185 (U.S. Jan. 26, 1982) — supports a policy of requiring each licensee to disclose his "degree" to the public. Unlike the reference to "license degree" in Rule 13:35-6.13, the statute speaks of "professional degree." Since the legislature obviously has not delegated to the Board of Medical Examiners the power to confer professional degrees — an authority vested in institutions of higher learning, N.J. Stat. Ann. §18A:3-1 et seq. (West 1978) — it is logical to conclude that the statutory phrase "professional degree" refers to a recognized academic degree.

Yet the Board has not observed this limitation. Foreign medical school graduates (FMGs), who have not been granted the academic degree of doctor of medicine, or who, in some cases, hold no professional academic degree at all, are issued licenses by the Board imprinted with the "M.D." suffix.

In defending its licensing practices for FMGs and osteopaths, the Board advances two arguments: (1) training in foreign schools is more akin to American medical schools than it is to osteopathic institutions, and (2) the public is entitled to know the background of licensees to whom it looks for health care.

The Board's position is seriously flawed. First, in trying to fit the schooling received by FMGs into the mold of either allopathic or osteopathic disciplines, the Board exceeds its statutory authority. As noted earlier, the statute only gives the Board the power to license individuals for the practice of "medicine and surgery." By unilaterally imposing the allopathic-osteopathic distinc-

tion on licenses issued, the Board is simply continuing the earlier invidious tradition of equating the status of a physician with an M.D. degree, a policy plainly contrary to the expressed legislative aim.

The purported justification that the public should have accurate information about the training of the licensee is inconsistent with actual practice. The Board's policy of licensing FMGs as M.D's. promotes deception, not disclosure, since it is conceded that many of the FMGs do not in fact hold an M.D. degree. Many foreign medical schools are of high quality, and the training their graduates receive compares favorably with that given in those American schools which award the M.D. or D.O. degree. But that is not universally true, and it is not denied that in some instances, foreign medical training does not meet American standards. Yet, under the Board's current practice, both those persons who graduate from an approved American medical school and those persons who have had foreign training — some of whom are not even graduates — receive the same "license degree."

The misleading nature of the designation is extended even further by the Board's rule on advertising, since it requires the physician to utilize his "license degree," — not his "academic" or "professional" degree — on signs and in directories. Thus, the Board's practice with respect to the "license degree" conferred on FMGs does not inform the public but actually leads it to assume, erroneously, that the FMG was awarded an M.D. degree from an American medical school.[2]

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2. The record shows that two patients left Dr. Eatough because he had a D.O. degree, rather than an "M.D." designation. Clearly, then, he suffers harm under the board's policy because a member of the public might be led to consult an FMG whose training was inferior, but who is permitted — indeed required — to designate himself as an "M.D."

The Board seemingly recognized the dubiety of its policy when in 1979 it proposed to change its degree designation practice. The proposed rule would have required that a licensee designate himself simply as authorized to practice medicine and surgery, or some specialty, *e.g.*, "Dr. John Doe, licensed to practice medicine and surgery." FMGs would only be allowed to use such an identification. Graduates of American allopathic and osteopathic schools, who elected to do so, could use their academic degree, *e.g.*, "John Smith, M.D." or "John Smith D.O.," as the case may be.

This proposal resulted in several hundred letters of protest. Not unexpectedly, most came from FMGs and students studying abroad who objected to the provision because it would prevent them from identifying themselves as "M.D's." In spite of the fact that the proposed rule conformed to legislative intent, the Board withdrew the proposal and has continued the old, objectionable practice.

Since the Supreme Court of New Jersey has not been called upon to decide the issue presented here, we must predict how that court would interpret the state's Medical Practices Act. It is conceded that there is no express authority for the Board's actions, and so its defense must rely on implied power. In assessing whether a particular administrative action has statutory authorization, "the reviewing court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives." *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562, 384 A.2d 794, 804 (1978); *In re Suspension of Heller*, 73 N.J. 292, 374 A.2d 1191 (1977). Any agency action is defective where it is not statutorily authorized or is arbitrary or unreasonable. 384 A.2d at 804. "[A] court is bound to override an administrative construction where it is clearly contrary to the plain meaning of the statute." *Service Armament Co. v. Hyland*, 70 N.J. 550, 562, 362 A.2d 13,

19 (1976); *Kingsley v. Hawthorne Fabrics*, 41 N.J. 521, 197 A.2d 673 (1964). *See also, Ford Motor Credit Co. v. S. E. Barnhart & Sons, Inc.*, 664 F.2d 377 (3d Cir. 1981).

Some indication of the New Jersey Supreme Court's view of the Medical Practices Act may be gleaned from *Greisman v. Newcomb Hospital, supra*, and *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791 (1961). In *Greisman*, a licensed osteopath was excluded from the staff of a private hospital because of a by-law that limited staff admission to graduates of medical schools approved by the American Medical Association. The court held that the public interest and justice required rejection of the by-law as arbitrary. 192 A.2d at 825. Similarly, in *Falcone*, the court struck down a county medical society requirement that denied membership to an osteopath because he had not studied at a medical school approved by the AMA. 170 A.2d at 799.

These two cases demonstrate that the New Jersey Supreme Court has an overall commitment to the nondiscrimination policy adopted in the Medical Practices Act. It appears to me, therefore, that the court would be strongly disposed to strike down the discriminatory licensing policy that the Board has pursued with respect to osteopaths and FMGs.

Because I find a statutory violation, I do not meet the constitutional issues discussed by the majority. We differ on the question of statutory interpretation presented here, and it is unfortunate that there are no governing New Jersey decisions to guide us. That is not an unusual situation, however, and occurs all too frequently when litigants rush to the federal courts with a constitutional attack before fully exploring the state law issues. Resort to the state court in the first instance here might well have yielded an authoritative decision on state law, mak-

ing a federal constitutional challenge unnecessary.[3] Litigants should remember that we are to approach constitutional issues only after state grounds have been exhausted. *Hagans v. Lavine*, 415 U.S. 528 (1974). Indeed in this case the district court might well have considered whether *Pullman* abstention was in order. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941).

Because I am convinced that the Board acted in excess of its powers and contrary to the enabling statute, I would reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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3. The parties have relied upon Oliver v. Morton, 361 F.Supp 1262 (N.D. Ga. 1973), and Maceluch v. Texas State Bd. of Med. Examiners, No. CA-3-77-1498-G (N.D. Tex. July 10, 1981). In the latter case the court was called upon to construe a state statute and thus it is not pertinent to the legitimacy of the administrative regulation here. In *Oliver*, plaintiffs attacked a practice of the state Board of Medical Examiners, similar to the one challenged here, as not consonant with state law. Rather than reaching the issue of whether the regulation complied with the state statute — a question about which it had substantial doubt — the court decided that there had been a constitutional violation. *Cf.* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 125 (1909).

APPENDIX B
Judgment of March 1, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1717

EATOUGH, PHILIP B., DR.,

Appellant,

vs.

ALBANO, EDWIN H., DR., et al.,

(D.C. Civil No. 79-1421)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PRESENT: GIBBONS, WEIS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 1, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 26, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST: s/Sally Inross, Clerk

March 1, 1982

APPENDIX C
Order Staying Mandate, March 24, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1717

DR. PHILIP B. EATOUGH,
Appellant,

vs.

DR. EDWIN H. ALBANO, et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 21, 1982.

s/John Gibbons
Circuit *Judge*

Dated: March 24, 1982

APPENDIX D
Opinion of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 79-1421

DR. PHILIP B. EATOUGH,

Plaintiff,

v.

DR. EDWIN H. ALBANO, et al.,

Defendants.

LACEY, D.J.

Plaintiff Dr. Philip B. Eatough sues defendants Dr. Edwin H. Albano and the fourteen other members of the New Jersey State Board of Medical Examiners (Board), individually and as members of the Board. Jurisdiction is founded upon 42 U.S.C. §1983 (1976), its jurisdictional counterpart, 28 U.S.C. §1343(3) (1976), and 28 U.S.C. §§2201, 2202 (1976).

The complaint charges, in essence, that defendants have discriminated against plaintiff, a Doctor of Osteopathy (D.O.)[1] and Board licensed physician and surgeon, by (1) refusing to issue him a license with the designation "M.D." following his name, and (2) prohibiting him from advertising himself as an M.D. Instead, the Board issued plaintiff a license bearing the legend "D.O.," Stipulation of Facts (SF.) 18, and insists that he describe himself in any advertising as "Philip B. Eatough, D.O." or "Dr. Philip B. Eatough, D.O." SF. 20.

These actions of the Board are in contrast to its treatment of graduates of foreign medical schools (FMG's). Once FMG's have qualified to practice medicine and surgery in New Jersey by passing an appropriate examination,[2] the Board issues licenses to them bearing the initials "M.D." after their names, SF. 44, and permits them to advertise themselves as M.D.'s, many times without the Board having any knowledge of the extent of their medical training or the curriculum of their medical school, *id.*[3]

The Board's practice, plaintiff asserts, abridges his right to freedom of speech and expression under the first and fourteenth amnendments, and, in light of the Board's treatment of FMG's, constitutes a denial of his right to equal protection under the fourteenth amendment. In this action plaintiff seeks to have defendants permanently enjoined "from interfering with plaintiff's practice of medicine . . . and from attempting to prevent him from using the letters M.D. after his name," together with costs and attorneys' fees.[4]

The complaint also alleges that 45 N.J. Stat. Ann. §9-16 (West Cum. Supp. 1980-1981), which limits the advertising that practitioners of medicine and surgery may do in New Jersey,[5] is unconstitutional. Plaintiff therefore seeks a declaratory judgment that section 9-16 and certain Board rules, the "Degree Designation Rule"[6] and the "Advertising Rule,"[7] are void.[8]

The parties have agreed to submit the case for decision on a stipulated set of facts. For the reasons hereinafter set forth, judgment will be entered in favor of defendants.

I

In 1971 plaintiff graduated from the Philadelphia College of Osteopathic Medicine with the degree of Doc-

tor of Osteopathy. SF. 5-7. He interned at St. Michaels Center in Newark, New Jersey, in 1971-1972 and completed his residency there in June 1976. SF. 6.

In April 1972 plaintiff was licensed to practice medicine and surgery in the State of Missouri. SF. 17. In 1973 he received a license to practice medicine and surgery in New Jersey by endorsement of his Missouri license. *Id.; see* note 2 *supra.* As noted above, this license reads "PHILIP B. EATOUGH, D.O." SF. 18.

Plaintiff is a Diplomate in Internal Medicine and in Cardiovascular Diseases, having been board certified by the American Boards of Internal Medicine and Cardiovascular Diseases. SF. 24. Both these boards are approved by the American Medical Association (AMA). *Id.* Plaintiff has certificates from both boards, which he displays in his office. The one from the American Board of Internal Medicine reads: "PHILIP BRADLEY EATOUGH, M.D.," SF. 29; that from the American Board of Cardiovascular Diseases states simly: "PHILIP B. EATOUGH." Plaintiff's Exhibit 1.

Plaintiff's practice is limited to internal medicine and cardiovascular diseases. SF. 25. He asserts that he never has and does not now use any osteopathic manipulative techniques or principles in his practice. SF. 26.

When plaintiff first began to practice after receiving his license in New Jersey, he used the designation "D.O.," but soon came to believe that the public's perception of him was that he was not a qualified physician licensed to practice medicine and surgery. Thereafter, ceasing the use of "D.O.," he adopted the suffix "M.D." in his practice. He listed himself in the telephone directory as "M.D." and put up signs with "M.D." following his name. SF. 22. Through his lawyer, he made a written request to the defendants that a new medical license be issued to him bearing an "M.D." SF. 23. The defendants refused. *Id.*

In March 1979 two of plaintiff's patients wrote to the Board inquiring whether plaintiff was an "M.D." or an "Osteopath." SF. 32. These patients wanted to know if plaintiff was in fact a "real M.D.," because, they stated, they wanted to be treated by a competent physician. *Id.* They informed defendants that plaintiff was using "M.D." on his signs, bills, telephone listings, etc. SF. 35.

The Board's executive secretary answered the letters and stated that plaintiff was a Doctor of Osteopathy and that he had the same license as an "M.D.," together with all the rights and privileges to practice medicine and surgery in the State of New Jersey. SF. 33. When the two patients were informed that plaintiff was a "D.O.," they stopped seeking his services. SF. 34.

Thereafter, defendants wrote to plaintiff, told him to cease using the suffix "M.D." in his practice, and instructed him that he was in violation of the Board's Degree Designation Rule[9] and was subject to discipline by defendants. SF. 36. Fearing loss of his license and a fine, plaintiff sent to defendants a letter indicating compliance; however, he never ceased using "M.D." in his practice: his signs, bills, telephone listings, etc., continued to read "M.D." SF. 37-38.

Upon learning of plaintiff's intransigence, defendants wrote plaintiff a second letter ordering him to cease using the suffix "M.D." SF. 38. He was given thirty days to correct all materials used in his practice that identified him as "M.D." *Id.*: Plaintiff's Exhibit 2. Plaintiff again refused to comply, and on May 14, 1979, this lawsuit was filed.

II

The powers of the Board of Medical Examiners are derived from section 9-2 of the New Jersey Medical Practice Act (Act), 45 N.J. Stat. Ann. §§9-1 to 27.9 (West 1978), which provides, *inter alia,* that the Board

shall make and adopt all necessary rules, regulations and bylaws not inconsistent with the laws of the State or of the United States, whereby to perform the duties and to transact the business required under the provisions of this article (section 45:9-1 et seq.).

Id. §9-2.

The Act itself makes no distinction between graduates of allopathic and osteopathic medical schools for purposes of licensing. Licensing requirements are the same for all current applicants, regardless of the medical school attended. *See id.* §§9-6 to -14. Indeed, the statute states that "the practice of medicine and/or surgery shall be deemed to include . . . the practice of osteopathy . . . ". *Id.* §9-5.1 (West Cum. Supp. 1980-1981). The only section of the Act that specifically deals with issuance of medical licenses is section 9-12, which provides in part:

> Upon successful completion of the examination, the board, upon payment by the applicant to the treasurer of the board of a license fee of $150.00, shall certify and license said applicant to practice medicine and surgery in this State. . . .

Id. §9-12 (West 1978).

Although the Act draws no distinction between allopathic and osteopathic physicians and surgeons for purposes of licensure, the Board's Degree Designation Rule, 13 N.J. Ad. Code §35-4.1; *see* note 6 *supra*, requires that physicians licensed to practice medicine and surgery in New Jersey identify themselves by the degree designation appearing in the license issued to them by the Board. In addition, the Board in 1978 enacted its Advertising Rule, 13 N.J. Ad. Code §35-6.13, which requires physicians to use either "M.D." or "D.O." in any advertising, depending upon the inscription on their license.[10]

Advertising by persons licensed to practice medicine and surgery in the State is also strictly limited by the Act. 45 N.J. Stat. Ann. §9-16 (West Cum. Supp. 1980-1981). Upon proof of violation, the Board may refuse to grant or may suspend or revoke a practitioner's license.[11]

As indicated, plaintiff's claims are grounded on the first and fourteenth amendments.[12]

III

Plaintiff's equal protection argument is in two parts: (1) the Board's practice of differentiating between D.O.'s and M.D.'s on the licenses it issues and its Degree Designation Rule, which requires all persons licensed to practice medicine and surgery in the State to identify themselves by their degree earned, discriminate against D.O.'s, who are perceived by the public as less qualified than M.D.'s; and (2) the Board's practice of issuing all D.O.'s licenses inscribed "D.O." and requiring that they so list themselves, while at the same time issuing qualified FMG's licenses inscribed "M.D." and permitting them to list themselves by that designation, impermissibly discriminates against D.O.'s. Each of these arguments is rejected, but for different reasons.

As to the first contention—that the distinction between osteopaths and allopaths is impermissible—it is clear that this distinction was not created by the Board but by the two schools of medicine. Moreover, the distinction is meaningful: the parties agree that some D.O.'s offer manipulative treatment and some patients seek out these practitioners for precisely that reason. *See* SF. 71. *See also* Affidavit of Richard G. Stefanacci, D.O. ¶4 (Dec. 21, 1979) ("[N]umerous patients consult me or are referred to me expressly to avail themselves of the distinctive benefits of osteopathic treatment") (Defendants' Exhibit 11). Thus, the Board's rule and practice are rationally related

to a legitimate state interest: permitting the public to make an informed choice among physicians. Indeed, this same contention was presented, and rejected, in *Oliver v. Morton,* 361 F.Supp. 1262 (N.D. Ga. 1973) (three-judge court).

In *Oliver* plaintiff claimed that Georgia's statutory scheme, which drew the distinction between M.D.'s and D.O.'s drawn by the Board here, violated the equal protection clause of the fourteenth amendment. The court stated:

> The State's requirement that physicians hold themselves out to the public under the professional degree which they have received is thus a rational requirement in light of the evidence that some D.O.'s offer manipulative treatment and that some patients seek out and prefer D.O.'s for this or other reasons. The designation of the degree D.O. or M.D. thus helps the public in choosing a physician.

Id. at 1268. Plaintiff chose to attend the medical school from which he received his degree. As the *Oliver* court pointed out, that many people do not have a proper understanding of the meaning of the "D.O." designation "is a problem of public relations which must be overcome by osteopaths themselves and their organization, the A.O.A." *Id.*

As to plaintiff's claim that the Board's practice regarding D.O.'s is impermissible in light of its treatment of FMG's, I note that the court in *Oliver* indeed found such inconsistent treatment violates the right of D.O.'s to equal protection of the law. However, I am constrained not to follow the *Oliver* decision in this respect. Plaintiff's argument might have some validity if made by an M.D., were I to credit plaintiff's contentions that the medical school training received by FMG's is inferior to that received in this country by M.D.'s and D.O.'s, *see* Plaintiff's brief at

29-33,[13] on the theory that the worth of an M.D. degree and license was somehow diluted. However, for this argument to be valid as to D.O.'s requires the assumption that a D.O. degree and license are on their face of less value, in both a social and professional sense, than an M.D. degree and license, as viewed by the public. This is an assumption not waranted by the record now before me.[14]

Plaintiff has constructed a number of ingenious arguments based on the first amendment. Among these are arguments involving commercial speech, the public's "right to know," and the assertion that, because plaintiff does not actually subscribe to or practice principles of osteopathy, it is in fact misleading for him to represent himself as a D.O. A crucial part of all these contentions, however, is plaintiff's claim that

> the letters "M.D." no longer mean one who has received the degree of Doctor of Medicine (M.D.), but have the more universal meaning of one who is licensed to practice medicine and surgery. These letters are now generic and may be used by any physician who is licensed to practice medicine and surgery.

Plaintiff's Brief at 52.

Here again, the *Oliver* court's reasoning is persuasive:

> An essential element of plaintiff's First Amendment claim is his factual assertion that the term "M.D." has become a generic term which signifies a competent physician rather than the academic degree Doctor of Medicine. As evidence of this contention plaintiff has submitted into evidence a survey which indicates that approximately 70% of adult Georgians have the opinion that "M.D." signifies an occupation rather than an academic degree. The meaning of a term cannot be determined by the opinion of a majority of a random sample. The fact remains that at least in professional and academic circles the term "M.D."

signifies that one has received that academic degree. Plaintiff's First Amendment rights are not violated by the State's refusal to allow him to hold himself out to the public under a degree which he has not earned. See Drew Co. v. Federal Trade Commission, 235 F.2d 735, 739-740 (2d Cir. 1956), cert. denied, 352 U.S. 969, 77 S.Ct. 360, 1 L.Ed.2d 323.

Oliver v. Morton, supra, 361 F. Supp. at 1269-70.

More troublesome is plaintiff's argument that the Board's Advertising Rule, 13 N.J. Ad. Code §35-16, and 45 N.J. Stat. Ann. §9-16 (West Cum. Supp. 1980-1981) unconstitutionally infringe on his right to advertise his services.[13]

Plaintiff argues that he should be permitted to advertise on radio and television, in the white and yellow pages of the telephone directory, and by direct mail. His proposed advertising campaign would include "a description of his medical services, photocopies of his certificates from the Board of Internal Medicine and the Board of Cardiovascular Diseases, prices of routine services including electrocardiograms, stress tests, telemetry test, cardiac rehabilitation, and diabetes tests." Plaintiff's Supplemental Reply Brief at 3. He contends that subsection 9-16(j) of title 45 of the New Jersey Statutes, 45 N.J. Stat. Ann. §9-16 (West Cum. Supp. 1980-1981); *see* note 5 *supra,* which proscribes all but very limited advertising, *e.g.*, listing the licensee's name and professional degree in an alphabetical telephone directory, is plainly invalid under *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and, thus, that the Board's Advertising Rule, which permits greater advertising than the Act, was invalidly promulgated. Further, he charges that the Advertising Rule itself is violative of the first amendment; in particular, he attacks the rule's confinement of advertising to "newspapers or comparable written publications" and its

edict that all such advertising be done "in a dignified manner."

At the very least, plaintiff has raised a substantial question as to the validity of the rule itself. *See In re Koffler,* 51 N.Y.2d 140 (1980). However, while claims as to what he desires to do are contained in his briefing, there is no allegation in the pleadings that, the question of his degree designation aside, plaintiff has ever been disciplined or threatened with discipline by the Board for advertising in violation of the rule or, indeed, that he has ever undertaken to advertise in any manner that the rule prohibits. Thus, plaintiff's challenge to both the Act and the Advertising Rule, insofar as his claimed right to advertise more than his name and designation is concerned, is not justiciable. As the Supreme Court indicated in *Bates,* the first amendment over-breadth doctrine, which "represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court," *id.* at 380, does not apply here. *Id.* at 381. The rationale for the doctrine—that an overbroad statute may serve to chill protected speech—"applies weakly, if at all, in the ordinary commercial context." *Id.* at 380. Advertising that is linked to commercial well-being is unlikely to be chilled by overbroad regulation; advertisers can presumably determine more readily than others whether their speech is truthful and protected. *Id.* at 381. Thus, the Court concluded,

> Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," *Broadrick v. Oklahoma,* 413 U.S., at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow v. Virginia,* 421 U.S., at 817-818.

Id. Accord Davis v. Board of Medical Examiners, No. 80-1864 (D.N.J. Sept. 23, 1980).

To the extent plaintiff's challenge to the Advertising Rule is directed toward the vagueness inherent in the rule's "in a dignified manner" language, the same rationale applies.

IV

For the reasons set forth above, judgment will be entered in favor of defendants.

s/Frederick B. Lacey
UNITED STATES DISTRICT
JUDGE

Dated: March 25, 1981.

FOOTNOTES

1. "Osteopathy" is defined as

> 1. Any disease of the bone . . . 2. A school of medicine based upon the idea that the normal body when in "correct adjustment" is a vital machine capable of making its own remedies against infections and other toxic conditions. Practitioners use the diagnostic and therapeutic measures of ordinary medicine in addition to manipulative measures.

Stedman's Medical Dictionary 1004 (23d ed. 1976). This is to be distinguished from "allopathy," the more widespread practice, which is

> 1: a system of medical practice that aims to combat disease by the use of remedies producing effects different from those produced by the special disease treated 2: a system of medical practice making use of all measures that have proved of value in treatment of disease.

Websters' Third New International Dictionary 57 (1966). Graduates of schools of allopathic medicine receive the degree of "Doctor of Medicine" (M.D.).

Manipulative therapy is used by many physicians, both M.D.'s and D.O.'s, particularly by orthopedists, neurologists, and physiatrists. SF. 60. Indeed, defendants have conceded that "each accredited osteopathic medical school provides medical education, which is equal in both substance and quality to that which is provided in a non-osteopathic medical school." SF. 8. In fact, the New Jersey College of Osteopathic Medicine and the New Jersey College of Medicine share the same facilities for instruction in the basic sciences during the first two years. They share the same rooms, labs, and instructors, and the examinations are the same. The students in the osteopathic medical school are required, in addition, to take courses in osteopathic manipulation, which many of the students in the medical school audit. SF. 59.

2. The standard medical and surgical examination in the State of New Jersey is the Federation Licensing Examination (FLEX), and this examination is given to all qualified applicants regardless of the medical school attended or the degree earned. 13 N.J. Ad. Code §35-3.1. The FLEX examination covers all medical subjects except

those dealing with osteopathic principles and manipulation. SF. 14. Persons who have valid licenses from another state, received after the effective date of the FLEX legislation, can be licensed by endorsement by the Board. 13 N.J. Ad. Code §§35-3.2, -3.3. The Board will also grant licensees to practice medicine and surgery to persons who have successfully passed the examination of the National Board of Medical Examiners or the National Board of Osteopathic Medical Examiners. *Id.* §35-3.4.

3. In addition, a program known as "Fifth Pathway" was developed in the past few years to permit a select number of United States citizens who are students in foreign medical schools to leave their school after completing all of its required courses, but without having received a medical degree, and do a fifth year in a hospital approved by the American Medical Association (AMA). This additional training is to give these students instruction in clinical medicine that they may not have received at their foreign medical school. SF. 46. After completing the fifth year, these students are permitted to enter an approved internship and then take the FLEX examination; when they become licensed, the Board issues them licenses inscribed with their name and the suffix "M.D." SF. 46-47.

4. Both the American Association of Colleges of Osteopathic Medicine and the American Osteopathic Association have submitted *amicus curiae* briefs on behalf of defendants.

5. Section 9-16 of the Act provides as pertinent here:

> The board may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery . . . upon proof to the satisfaction of the board that the holder of such license . . . (j) has advertised in any manner, whether as an individual, through a professional service corporation or through a third party on his behalf, the practice of medicine and surgery or chiropratic; provided, however, that the following shall not be deemed to be advertising prohibited under this chapter:
>
> a. Public information for educational purposes on the practice or professions of medicine and surgery or chiropractic which does not contain the name of any person licensed to practice medicine and surgery or chiropractic in this State or the address

of any location where medical or chiropractic examination or treatment may be had or is recommended or suggested;

b. Publication of a brief announcement of the opening of an office or the removal to a new location, containing the name, professional degree, type of practice, address, telephone number, and office hours of the licensee;

c. A listing in an alphabetical telephone directory of the name of a licensee together with his professional degree or the abbreviation therefor;

d. A listing in a classified telephone directory with standard type limited to the name, professional degree, type of practice, office and home addresses and telephone numbers, and office hours of a licensee;

e. The use of small signs on the doors, windows and walls of a licensee's office or on the building in which he maintains an office setting out his name, professional degree, type of practice, address and office hours in lettering no larger than 4 inches in height for street-level offices, and no larger than 6 inches in height for offices above street-level;

f. Communications with or without the name of the licensee distributed or mailed to his patients of record at his discretion;

g. A directory of physicians for consumer use which shall include the educational background, degrees, fellowships, certifications, specialties, experience and any other pertinent information which is related to the practice of medicine and surgery of the physicians. . . .

6. The Degree Designation Rule, 13 N.J. Ad. Code §35-4.1, passed by the Board in 1971, reads:

A physician licensed to practice medicine and surgery in the State of New Jersey shall identify himself only by that degree designation (M.D. or D.O.) which imprinted [*sic*] on the license issued to said person by the Board; for example, John Doe, M.D., John Doe, O.D. [*sic*], Dr. John Doe, M.D. or Dr. John Doe, D.O.

7. Section 35-6.13 of title 13 of the New Jersey Administrative Code provides:

(a) "Licensee" for the purpose of this regulation means a person possessing a plenary license to practice medicine and surgery. . . .

(b) A licensee in the State of New Jersey may provide information to the public, by publication in a dignified manner in newspapers or comparable written publications concerning: education, certification or appointment, location and availability of services, fees for routine professional services and other pertinent information about the licensee's practice. On any such publication, license degree must be designated. . . .

8. This claim was added by amendment of the pleadings in the pretrial order. *See* Joint Pre-Trial Order at 16.

9. 13 N.J. Ad. Code §35-4.1. For the text of the Degree Designation Rule, see note 6 *supra.*

10. For the text of the Advertising Rule, see note 7 *supra.*

11. For the text of section 9-16, see note 5 *supra.*

12. A third basis for plaintiff's complaint, implicit in those stated in text, is that the Board has acted *ultra vires* and in violation of the Act. *See* Plaintiff's Brief at 39-41. However, as to the Board's degree-designation practice, this contention is subsumed in plaintiff's other claims. The Board's powers under the act are limited only by "the laws of the State or of the United States." 45 N.J. Stat. Ann. §9-2 (West 1978). There is nothing in the Act itself prohibiting the Board's designation practice; consequently, the question is whether plaintiff's constitutional claims have merit. As to the Advertising Rule, see text pp. 9-11 *infra.*

Plaintiff further alleges that the Board has knowledge that Richard G. Steffanacci, a member of the Board, and several of his associates, all D.O.'s, have not been using the letters "D.O." after their names on signs in their office building. *See* Complaint ¶35; Plaintiff's Exhibit 4. Defendants have admitted as much. *See* SF. 49. However, they submit that as soon as this was brought to Steffanacci's attention, the sign was changed to conform to the regulations. Defendants' Reply Brief at 9. *See* Defendants' Exhibit 23. On the record now before me, absent further proof that the Board has permitted such violations to continue after being apprised of them, I

cannot find a pattern of selective enforcement that would constitute a violation of equal protection.

I note, too, the complaint's vague reference, without elaboration, to a due process claim. To the extent plaintiff is asserting a property right to designate himself as an "M.D.," see Oliver v. Morton, 361 F. Supp. 1262, 1270 (N.D. Ga. 1973) (three-judge court) ("]I]t is clear that plaintiff has been unable to show the court any right to hold himself out under the designation 'M.D.' "), and discussion in text *infra.*

13. Although I do not reach this question, I note that substantial support for plaintiff's position is provided by the recent GAO report subtitled "Policies on U.S. Citizens Studying Medicine Abroad Need Review And Reappraisal":

> In our opinion, none of the six foreign medical schools we visited offered a medical education comparable to that available in the United States because of deficiencies in one or more of the following areas—admission requirements, facilities, equipment, faculty, curriculum, or clinical training.

Comptroller General, GAO, Report to the Congress 49 (Nov. 21, 1980). *See* Statement by Gregory J. Ahart, Director GAO Human Resources Division, Before Subcom. on Health and the Environment of House Comm. on Interstate and Foreign Commerce (Nov. 21, 1980). *See also* Editorial, *The Back-Door Physicians,* N.Y. Times, Jan. 3, 1981, at 20.

14. Plaintiff's Exhibit 10 is plainly inadequate. As pertinent here, Exhibit 10 consists of copies of pages from *The Osteopathic Physician* that refer to (1) an article in *Parade Magazine* that states osteopaths ranked among those medical specialists with the lowest prestige in a study conducted among doctors, hospital patients, and graduate business school students; and (2) an "informal survey" conducted "at a shopping center in Kansas City, Missouri, not far from two Osteopathic medical colleges," which found only one person who knew what a D.O. was. I accord no weight to this material.

15. As indicated, plaintiff first raised this question by amendment of the complaint at pretrial. At the court's request, additional briefing on the issue was submitted by the parties.

APPENDIX E
Judgment of District Court, March 25, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 79-1421

DR. PHILIP B. EATOUGH,

Plaintiff,

v.

DR. EDWIN H. ALBANO,

Defendants.

ORDER

The court having heard oral argument and considered the submissions of the parties, and the parties having agreed to trial of this matter on a stipulated set of facts,

IT IS HEREBY ORDERED that judgment is entered in favor of defendants, in accordance with an opinion filed this date.

s/FEDERICK B. LACEY
UNITED STATES DISTRICT
JUDGE

Dated: March 25, 1981

Opposition

No. 81-1941

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. PHILIP B. EATOUGH,

Petitioner,

v.

DR. EDWIN H. ALBANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT MEMBERS OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, *ET AL.*

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On the Brief.

Dated: May 17, 1982

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Does the degree designation rule of the New Jersey Board of Medical Examiners requiring licensed physicians to identify to the public whether they possess an M.D. or D.O. degree, and its application to petitioner, rationally relate to the legitimate state interest of facilitating for the public an informed choice among physicians: (a) where the two types of degrees represent two separate, accepted and respected approaches to medical training; (b) where there are differences in the approaches to medical training; (c) where there are two types of accredited medical schools—one conferring a degree of M.D. and the other conferring a degree of D.O.; (d) where, therefore, the distinction between schools was created not by the New Jersey State Board of Medical Examiners but by the schools of medicine; (e) where petitioner voluntarily chose to attend a D.O. degree-conferring school; (f) and, finally, where in addition to the privilege of practicing the specialized osteopathic medicine, the license issued to the holder of the D.O. degree confers the same privileges to practice medicine and surgery as are conferred on the holder of an M.D. degree?

2. Does the application of the policy of the New Jersey Board of Medical Examiners respecting foreign medical degrees, pursuant to which M.D. licenses are issued to qualifying foreign-educated doctors of medicine, violate petitioner's equal protection rights: (a) where there are over 116 different foreign degrees in foreign languages; (b) where the public is not generally aware of the meaning of the various foreign degrees; and (c) where no accredited foreign medical school holds itself out as providing training equivalent to the D.O. training?

3. In light of current Supreme Court interpretations of permissible commercial advertising by licensees of a professional board, is the present Medical Board rule —permitting advertising by licensees, including petitioner, of educational background, degrees, fellowships, certifications, specialties, fees, experience and any other truthful material pertinent to the licensee's practice—reasonably within the scope of its underlying enabling legislation?

Parties to the Proceeding

This case involves challenges by a Doctor of Osteopathy to the regulation of the practice of medicine in New Jersey by State law and by the New Jersey Board of Medical Examiners. The respondents are members of the New Jersey State Board who were sued individually and as members of the Board. Of the persons originally listed, it should be noted that Dr. Bookbinder resigned from the Board on April 20, 1979. Dr. Rosser resigned July 9, 1979. Both were replaced subsequent to the filing of this complaint by new members appointed by the Governor; additional replacements have taken place since that date as well, including Dr. Stefanacci and Dr. Ware.

The petitioner is Philip B. Eatough, D.O., licensed as an osteopathic physician with full privileges to practice medicine and surgery in the State of New Jersey.

It should be noted that amici curiae in the District Court as well as in the Third Circuit Court of Appeals were the American Osteopathic Association and the American Association of Colleges of Osteopathic Medicine. Both groups supported the policy of the New Jersey Board of Medical Examiners.

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No. 81-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. PHILIP B. EATOUGH,

Petitioner,

v.

DR. EDWIN H. ALBANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT MEMBERS OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, *ET AL.*

Opinions Below

The Third Circuit Court of Appeals affirmed (with one judge dissenting) the judgment of the District Court of New Jersey finding no merit to the claims of violation of equal protection or due process by the New Jersey State Board of Medical Examiners as to petitioner Doctor of Osteopathy (D.O.) who has plenary privileges to

practice medicine and surgery in this State but is not permitted to represent himself as a Doctor of Medicine (M.D.).

Statutes and Board Regulations

N.J.S.A. 45:9-16(j)(g) states, in pertinent part, as follows:

> [Permitted advertising shall include] a directory of physicians for consumer use which shall include the educational background, degrees, fellowships, certifications, specialties, experience and any other pertinent information which is related to the practice of medicine and surgery of the physicians. (Amended by L. 1977, c. 380, eff. Feb. 2, 1978).

N.J.A.C. 13:35-4.1 states as follows:*

> Degree Designation. A physician licensed to practice medicine and surgery in the State of New Jersey shall identify himself only by that degree designation (M.D. or D.O.) which is imprinted on the license issued to said person by the board; for example, John Doe, M.D., John Doe, D.O., Dr. John Doe, M.D. or Dr. John Doe, D.O. (R.1971 d.106, eff. July 2, 1971.)

N.J.A.C. 13:35-6.13 states, in pertinent part, as follows:

> (b) A licensee in the State of New Jersey may provide information to the public, by publication

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* Spelling errors appearing in the official compilation of the New Jersey Administrative Code have been corrected here, as petitioner has done.

in a dignified manner in newspapers or comparable written publications concerning: education, certification or appointments, location and availability of services, fees for routine professional services and any other pertinent information about the licensee's practice. On any such publication, license degree must be designated. To the extent that information provided to the public by the licensee may be misleading, the licensee shall provide clarification, such as, but not limited to, whether additional charges may be incurred for related services when fees are stated.
(R. 1978, d. 126, eff. Apr. 14, 1978).

Statement of the Case

Petitioner graduated from the Philadelphia College of Osteopathy, receiving the academic degree of Doctor of Osteopathy (D.O.). He received a license to practice medicine in Missouri and requested a New Jersey license by endorsement. His Missouri license identified him as "Philip B. Eatough, D.O.", in accordance with tradition observed in virtually all States of the United States, including New Jersey, and United States possessions. The New Jersey Board of Medical Examiners granted Eatough licensure by endorsement and marked his license in exactly the same way. His New Jersey license gives him plenary privileges to practice medicine and surgery in this State, and the New Jersey Board requires him by rule N.J.A.C. 13:35-4.1 to include his degree in his professional representations to the public. That requirement, for the purpose of providing useful information to consumers selecting a licensed practitioner of any of the eleven categories of health care professionals licensed by the Board, has consistently been applied to all licensees.

The requirement of professional representation by degree appears in the pertinent practice acts of the various health professions under the jurisdiction of the Medical Board and is further embodied in N.J.A.C. 13:35-4.1 for physicians. The effect of the rule is that not only does petitioner's New Jersey medical license—like his Missouri license—read "Philip B. Eatough, D.O., licensed to practice medicine and surgery in the State of New Jersey", but he is expected to include this degree designation on his professional stationery, business cards, billing, etc. Petitioner admits that he willfully ignored this requirement and held himself out to the public as an M.D., an academic degree he does not possess and which is therefore not listed on his license.

Petitioner challenged several Board policies affecting the regulation of medical practice in New Jersey. All were rejected initially by the District Court of New Jersey. One challenge was based upon the Board's denial of an alleged First Amendment right for Eatough to refer to himself as "M.D." The District Court recognized that petitioner's main complaint was that he feared he was earning less income as a D.O. than he might, if he possessed the M.D. degree. Further, that such revenue decrement, if it existed at all, was the result of insufficient knowledge on the part of the public in this area of the country of the educational attainments of a D.O. The court recognized that this was a problem for petitioner himself to deal with, and did not involve state action. The District Court also rejected petitioner's challenge that the Medical Board's rule on advertising was too liberal, since his opposition to the expansiveness of the Board's position on commercial speech was entirely theoretical, and no advertising of his had ever been criticized by the Board other than with respect to his admitted wilful use of the M.D. degree he did not possess.

Petitioner further alleged denial of Fourteenth Amendment equal protection rights because the Board issues licenses denominated as "John Doe, M.D." to graduates of internationally recognized foreign medical schools, all of which follow the traditions of allopathic medicine, and issue to their graduates diplomas worded according to the scholarly traditions of each country, such as "Euhaksa," "Igakushi," "Doctor in Medicina," "Medico-Cirujano," "M.B.B.S.," etc. Indeed, there are some 116 different titles in active use in various parts of the world, as shown in the exhibits submitted below. Not one of those schools, however, holds itself out as espousing the teaching of osteopathic medicine and the special approach to the practice of medicine vigorously propounded by the osteopathic philosophy. As to the graduates of those foreign medical schools who succeed in passing several successive qualifying examinations and ultimately pass the licensure examination, the New Jersey Board issues to them a license identifying them as, for example, John Doe, M.D. Petitioner asserts that this is discriminatory as to him.

The District Court found that no evidence had been presented which suggested that a D.O. degree or license are on their face of less value, in both a social and professional sense, than an M.D. degree and license. The Court held that petitioner, who possesses a plenary license in New Jersey, did not therefore have sufficient standing to raise a question as to alleged discrimination with respect to M.D. licenses issued to graduates of foreign medical schools.

On appeal to the Third Circuit, petitioner abandoned his First Amendment challenge to the Board's prohibition on false representation of himself by the false academic degree, and the Third Circuit opinion so noted this (Pa7).*

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* It appears nevertheless that petitioner has again adverted to the First Amendment at Pb2, albeit without in any way explaining its sudden reappearance in this case or relating his claims thereto.

Petitioner's constitutional claims were fully considered by the Third Circuit and rejected by the majority. The lone dissenter did not find it necessary to even reach the constitutional claims, finding that a State law question was involved which had never been considered by the New Jersey Supreme Court; he believed the State court would find that the New Jersey Legislature did not wish the public to be informed about a physician's academic degree or, if it did, then a graduate of a foreign medical school should be required to so indicate (Pa14 to 20).

ARGUMENT FOR DENYING THE WRIT

I. The Medical Board rule requiring a physician to include in his advertising his academic degree, which indicates allopathic or osteopathic medical training, is rationally related to a legitimate State interest in providing useful information to the public.

The issues presented by petitioner all relate to the regulation of the practice of medicine by the State of New Jersey and its appointed Board of Medical Examiners. All of the issues are centered upon petitioner's attempt to negate the existence of osteopathy as a separate but co-equal branch of the philosophy of medicine so that he can obliterate all reference to his actual academic training—a reference which the Medical Board requires all of its some 30,000 licensees to make available to the public.

It is well established that regulation of the practice of medicine by a state, through its board of medical examiners, is within the police power of the state. There is no "fundamental right" to practice medicine and all practice is subject to such regulation as a state's medical board

shall find appropriate to protect the public and to advance the public's interests, subject only to proper constitutional challenges. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954); *Watson* v. *Maryland*, 218 U.S. 173 (1910); *Garcia* v. *Texas State Board of Medical Examiners*, 384 F.Supp. 434 (W.D. Tex. 1974). Where there is no impingement upon a fundamental right and no classification based upon a "suspect criterion" (*In re Griffiths*, 413 U.S. 717 (1973)), petitioner's complaint is subject solely to the limited inquiry of whether there exists any rational basis for the distinctions he complains of. *Schilb* v. *Kewel*, 404 U.S. 357 (1971), *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

As the Third Circuit noted, petitioner has never suggested that the Board's rules burdened a "suspect class" or a "fundamental right." Rather, the Board's rule requiring truthful disclosure was no more than ordinary social and economic regulation. As such, the constitutional standard is the "rational relation test." Both courts below recognized that petitioner's main complaint is really no more than his criticism of the economic and social regulation which the New Jersey State Legislature saw fit to impose upon physicians licensed in that State, and with the interpretation thereof by the New Jersey Board of Medical Examiners. That implementation has long been recognized to possess a presumption of validity unless shown to bear no rational relationship to legitimate state objectives, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), and to rely upon grounds "wholly irrelevant" to those objectives. *McGowan* v. *Maryland, supra.*

The objective of the Medical Board rule challenged by petitioner is to provide to consumers at least minimal information respecting the type of health care license

possessed by the practitioner or the degree earned by the licensee. With respect to physicians, that means identifying oneself as John Doe, M.D. or John Doe, D.O., *as the case may be.* Petitioner makes a three-fold argument: he denies that there is any significance to the D.O. degree; second, whether or not there is, he wishes to disassociate himself from it; third, he demands to unilaterally confer upon himself an "M.D." degree which he does not possess, on the bold assertion that New Jersey cannot regard it as anything more than a generic expression of general occupation. The Medical Board rejected all of these arguments, as did the courts below. Evidence was presented below that the policy of the State of New Jersey, as implemented by the Medical Board, is to recognize that there are two main philosophies of medical training in this country: osteopathy and allopathy. Both the Third Circuit and the District Court found that osteopathy is a distinct approach to medical treatment which arose in the late 19th century in the midwestern portion of the United States. It is generally contrasted with allopathy, the more well known approach used by the majority of physicians in this country and abroad. As summarized by the Third Circuit, osteopathy:

> stresses a view of the human organism as a self-regulating and self-healing whole. In emphasizing the interdependence and interrelatedness of bodily systems, osteopathy tends to employ surgery and drug treatments less frequently than does allopathy. Instead, there is a more frequent use of techniques of "bio-mechanics" to manipulate the neuromusculoskeletal system in order to return the various bodily systems to their naturally harmonious state. (Pa3)

All parties agree that osteopathic students study the same basic science as allopathic students, and that the osteopathic medical students are *required* to take additional courses in osteopathic theory and manipulation and that these courses are an integral part of the study of osteopathic medicine. At present, there are fourteen osteopathic medical schools in the United States, and they are accredited by their own professional organization, the American Osteopathic Association. All the rest of the medical schools in this country are of the allopathic type, and they are accredited by the American Medical Association. Both types of medical schools and both professional associations are recognized and respected in New Jersey, as shown by express stautory representation on the Board of Medical Examiners and by the establishment of both types of medical schools in this State.

Both courts below considered and correctly decided the issues. They clearly found that the Board's degree designation policy effected the State's public purpose in affording access to consumers of useful information that is truthful, including the practitioner's academic degree and specialties. This policy appears in many portions of the State's Medical Practice Act, which were set forth in detail for the courts below. Nevertheless, petitioner complains that the State should not legitimately distinguish on the license between the two types of practitioners. He suggests that there was no osteopathic-allopathic distinction in this State until recently and bases this upon an alleged two hundred-year tradition of using the M.D. degree designation in a generic manner. In fact, the law establishing the Board of Medical Examiners was not enacted until 1894, which was some fifty years after the development of osteopathic medicine. Indeed, osteopathy as one of the respected minority schools of

practice was expressly honored in the statutory requirement of N.J.S.A. 45:9-1 that the Medical Board:

> shall consist of nine graduates of schools of medicine who shall possess the degree of M.D., and in addition the membership of said Board shall comprise one osteopath. . . .

Whether or not the decisions below are correct, however, and even were one to consider petitioner's claim independently of New Jersey law, his argument is without merit. His assertion that he may give himself any professional-sounding title he chooses, relying upon N.J. S.A. 45:9-18, is clearly frivolous. That section states, in pertinent part, as follows:

> Any person shall be regarded as practicing medicine and surgery within the meaning of this chapter, who shall use the words or letters "Dr.", "doctor", "professor", "M.D." or "M.B." in connection with his name, or any other title intending to imply or designate him as a practitioner of medicine or surgery in any of its branches, and who, in connection with such title or titles, or without the use of such titles, or any of them, holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall either offer or undertake by any means or methods to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition. . . .

Correctly construed by the Third Circuit, that section is not an invitation to allow anyone to offer to treat human ailments and to freely call himself a doctor. On the

contrary, it is a legislative warning that a semantic subterfuge will not obviate the protections required and conferred by licensure, and that anyone who engages in the described conduct shall be deemed to be engaging in the practice of medicine and surgery for which N.J.S.A. 45:9-6 requires prior licensure by the Board. Petitioner has ignored the context and purpose of Section 18; it does not support his claim.

The state's objective in requiring communication of information which is *generally* relevant to the consuming public when choosing a physician is a determination well within the police power of the state and the implementing board, and is a determination which is sufficiently suported by the practical background of medical training in this country. The historical development and present active existence of both M.D. and D.O. philosophies and the many medical colleges teaching them in the United States are facts which the medical profession and the New Jersey Board recognize and accept. The record in this case demonstrated that there are differences between allopathy (M.D.) and osteopathy (D.O.) and that it is entirely reasonable for the Board to require that the public should be informed of them. Both the Third Circuit and the District Court were satisfied that there was a distinction between osteopaths and allopaths and that the distinction had been created not by the Medical Board but by the two schools of philosophy of medicine. That the difference in approach continues to exist today is manifested in this State where the New Jersey Legislature has established the University of Medicine and Dentistry of New Jersey which includes as two separate degree-granting components the School of Medicine—which grants an M.D. degree, and the School of Osteopathic Medicine—which grants a D.O. degree.

The encouragement by the State and by the Board of this form of medical and philosophical diversity in no way imports an unlawful discrimination. This petitioner has never asserted that his privileges or practices in the conduct of his profession have ever been less than any such privileges and practices permitted to all other M.D. and D.O. licensees of the New Jersey Board. What he complains of is his own perception of lack of social standing, which, as the District Court below and as the court in *Oliver* v. *Morton,* 361 F. Supp. 1262, 1268 (N.D. Georgia 1973), clearly understood, was related exclusively to the comparative lack of publicity devoted to the osteopathic profession by the osteopathic professional associations themselves.

Both courts agreed that the Board's rule is constitutional because it does articulate a legitimate state interest: allowing the public to make an informed choice among physicians. This holding is in accord with the other decisions known to respondent to have considered the issue of mandatory degree-identification: to wit, *Oliver* v. *Morton, supra,* and *Maceluch* v. *Texas State Board of Medical Examiners,* No. CA-3-77-1498-G (N.D. Tex. July 10, 1981) which opinion (Appendix A herein) was provided to the Third Circuit by one of the amicus curiae below, the American Osteopathic Association. The District Court analysis is the same (Pa28, 29). Thus, there is neither any state action involved nor any substantial federal question, and no reason for this Court to review the decisions below in favor of respondents, Board of Medical Examiners, as to the requirement that petitioner represent himself with his earned academic degree and that the representation be truthful.

II. Petitioner's practice privileges are complete and are unaffected in any constitutional respect by the Board's policy on license designation for foreign school graduates.

Petitioner challenges the rejection by both courts below of his claim of alleged discrimination, in that he cannot use the M.D. degree designation, but graduates of internationally recognized foreign medical schools can. As noted above, these medical schools confer a total of some 116 different titles in different languages. Not one of these schools identifies itself as a School of Osteopathic Medicine.* In dramatic contrast, all of the medical schools teaching osteopathic medical practice refer in the school name to that fact, and all confer on their graduates the degree of Doctor of Osteopathy. All 14 of the schools are located in the United States and their graduates are eligible for plenary practice licensure in every state. Osteopathy is regarded as a uniquely American form of medical practice and, as noted above, is given special recognition by New Jersey both in the statutory complement of Medical Board appointments and in the State's medical schools.

The Board therefore deemed it appropriate to translate the multitude of foreign-word degrees and determined that the graduates of all foreign medical schools warranted inclusion in the M.D. branch of medical philosophy, not

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* As shown in the record below, there is one school in Great Britain which describes itself as training physicians in osteopathic principles, but since the British government does not grant graduates of that program an unrestricted license to practice, that school is not recognized in international education circles as an accredited school. Its graduates are therefore ineligible to take the licensing examination in New Jersey or any other state of the United States.

the D.O. branch. Petitioner disputes this "legislative" classification by the Medical Board, and urges this Court to find it unconstitutional. He suggests the contrary conclusion—a finding of unequal treatment, as was made by the District Court in *Oliver* v. *Morton, supra,* and a Circuit Court of Miller County, Missouri, in the unreported case of *Missouri State Board of Registration for the Healing Arts* v. *Giffen,* CV 579-98 CC. (petitioner's supplemental Appendix). It should be noted that both cases turned not on a general policy of the Georgia Board or the Missouri Board, respectively, but on specific statutory directives as to reference to educational degrees, established by the legislatures of those states, which directive left no room for discretion by the medical board and which the boards had actually violated. No such situation obtains under New Jersey law. Recognizing that the New Jersey statute—which contains so many provisions referring to "degree" of the physician—did not expressly direct the Board to list degree on the license, petitioner argues that when an implementing detail is not expressly mentioned, it must be prohibited. Petitioner's theory has been expressly rejected not only by the Third Circuit but by prior decisions of this Court. Contrary to his assertion, a legislative body need not "articulate" its reasons for enacting a statute—or a rule. *U.S. Railroad Retirement Board* v. *Fritz,* 449 U.S. 166 (1980). Moreover, the Third Circuit majority found inapplicable the very cases petitioner continues to urge respecting the alleged arbitrary discrimination, since each one was readily distinguishable on its facts or on the law, since each dealt with either express legislative statements by Congress or with serious gender-based discriminations. The District Court observed that no evidence had been presented which suggested that a D.O. degree and license are on their face of less value, in both a social and professional sense, than

an M.D. degree and license. That court therefore held that since petitioner possesses a plenary license in New Jersey, he did not even have standing to raise a question as to the alleged discrimination. (Opinion, Pa29, 30).

In the Third Circuit, the dissenting judge similarly saw no reason to reach petitioner's constitutional claims. He suggested that the claim be considered under State law. Although he recognized that the New Jersey Supreme Court had never been called upon to construe the issue, he believed the New Jersey Court would strike down a licensing policy which he found to be discriminatory. He decried petitioner's failure to have exhausted State court remedies, and suggested that the District Court might well have considered whether abstention was in order, under *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496 (1941). Respondents urge that, even if this Court be persuaded by the considerations raised by the lone dissenter, that is all the more reason to deny a writ in this case, as petitioner never troubled to approach the State court with these questions. This Court should not review a Court of Appeals decision affirming a District Court decision alleged, even in only the dissenting opinion, to conflict with a law of a state within its circuit. *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701 (1948).

New Jersey does indeed have a strong state policy abjuring wrongful discrimination in all areas of public life. However, the majority of the Third Circuit, as well as the District Court, considered petitioner's constitutional claims, and rejected them. Petitioner has baldly asserted (Pb16) that: "the majority below agreed with petitioner and stated that as long as foreign medical graduates are permitted to use "M.D." then it is unwise and unfair to deny him the right to do so." This is a radical distortion of the actual comment of the Third Circuit which

merely expressed its sympathy that some members of the public might not be aware of his educational background, and stated (Pa14) that is "might conceivably even question the wisdom or fairness" of the State policy. The Court emphatically concluded, however, that the role of a court in applying the equal protection clause is limited in this type of case to ascertaining "whether there is some reasonable basis for finding that the distinctions employed further a legitimate state purpose." (Pa14). The court found that there is indeed such a rational basis here. Bearing in mind that the basic privilege of licensed plenary practice for D.O.s and M.D.s is the same in the United States, the Third Circuit held, in accordance with long tradition, that the wisdom of the Board's policies on these issues is not subject to judicial review. It is enough that the legislative facts on which the classification is based can reasonably be conceived to be true by the governmental decision maker. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 659 (1981); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979); Third Circuit Opinion below (Pa13).

III. The Board rule allowing to its licensees a generous latitude in commercial advertising is permissible under State and constitutional law.

Petitioner appeals the rejection of his complaints about the Board's advertising rule, N.J.A.C. 13:35-6.13. He erroneously asserts that the rule violates the original enabling legislation by being too permissive, and simultaneously complains that the rule violates his Fourteenth Amendment rights by allegedly preventing him from informing the public that he is a physician practicing internal medicine and cardiology. This claim is clearly be-

lied by the fact that the patient's complaint which first brought petitioner to the attention of the Board lists his advertised specialty; yet, as he well knows, the Board criticized him solely and exclusively for his use of the M.D. degree which he does not possess, an untruthful and misleading act (Pa26). See, *In re R.M.J.*, —— U.S. ——, 71 L.Ed. 2d 64 (1982), holding that a licensing agency may properly prohibit untruthful or misleading advertising (in that case, state court regulation of attorney advertising). Further, the advertising of a medical specialty is expressly permitted by New Jersey law. Both courts below recognized the existence since 1978 of N.J. S.A. 45:9-16(j)(g) which permits:

> a directory of physicians for consumer use which shall include the educational background, degrees, fellowships, certifications, specialties, experience and any other pertinent information which is related to the practice of medicine and surgery of the physicians. N.J.S.A. 45:9-16(j)(g) (West Supp. 1981-82).

(Pa9). Pursuant to that law, the Board's advertising rule not only authorizes but encourages dissemination of a wide variety of pertinent information for consumer benefit. As recognized by the District Court (Pb32), a court should not pass upon alleged constitutional issues that have not yet materialized and that are merely potential. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 70-81 (1961); *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

Summary

In short, all of the courts previously considering this question have come to the same analysis of petitioner's real concern and have arrived at the same conclusion rejecting his claims. Judge Lacey of the District Court chose to quote (Pa29) from *Oliver* v. *Morton*, supra:

> The State's requirement that physicians hold themselves out to the public under the professional degree which they have received is thus a rational requirement in light of the evidence that some D.O.'s offer manipulative treatment and that some patients seek out and prefer D.O.'s for this or other reasons. The designation of the degree D.O. or M.D. thus helps the public in choosing a physician. [*Oliver*, at 1268]

Judge Lacey found that:

> Plaintiff chose to attend the medical school from which he received his degree. As the *Oliver* court pointed out, that many people do not have a proper understanding of the meaning of the "D.O." designation "is a problem of public relations which must be overcome by osteopaths themselves and their organization, the American Osteopathic Association. *Id.*" [1268]

A court should not strike down a board policy requiring all graduates of an osteopathic school of medicine —a distinctly American philosophy—and all graduates of an allopathic school to make information on type of schooling available to the public. That policy facilitates a meritorious "discrimination"; one based, for the overwhelming number of osteopathic practitioners, on rational con-

sumer decisions. The fact that this individual osteopath has chosen to turn his back on the school which imparted to him all his basic medical training is irrelevant to the general licensing plan, the goals of which are rationally related to the legitimate state interest in providing useful information to the public.

CONCLUSION

For these reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Respondent, Members of the New Jersey State Board of Medical Examiners.

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOAN D. GELBER,
Deputy Attorney General,
On the Brief.

Dated: May 17, 1982

[APPENDIX FOLLOWS]

Appendix

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Filed July 10, 1981)

DR. JOHN MACELUCH and DR. ROBERT GLICK,
Plaintiffs,

v.

TEXAS STATE BOARD OF MEDICAL EXAMINERS, *et al.*,
Defendants.

Civil Action No. CA-3-77-1498-G

ORDER

John Maceluch and Robert Glick are physicians licensed by the State of Texas who received degrees from a school that confers the degree "Doctor of Osteopathy" rather than the degree "Doctor of Medicine." They sue officers

and various members of the Texas State Board of Medical Examiners ("Board"). Relying in part on the stipulated fact that "[t]here is no substantial difference between accredited medical schools irrespective of the terminology of the degree conferred, except that students attending medical schools conferring the degree 'Doctor of Osteopathy' are required to take, and be examined in, several courses in manipulative therapy," plaintiffs ask this court to enjoin or declare unconstitutional the Texas licensing scheme which prevents them from using the designation "M.D." after their names on their letterhead and on other public listings of diverse nature. Plaintiffs allege that by forcing them to use the designation "D.O.," Texas subjects them to prejudice, antipathy and loss of earnings; that an "M.D." designation would more accurately identify their professional skills and practices. The parties have agreed to submit the case for decision on the basis of stipulations and the deposition testimony.[1]

In Texas, all licenses to practice medicine read the same, except that licensees with degrees from schools conferring the degree "Doctor of Medicine" have the initials "M.D." following their names and those with degrees from a school conferring the degree "Doctor of Osteopathy" have the initials D.O. following their names. The requirements for licensure are identical: all Texas applicants must pass a uniform "Federation Licensing Examination" (FLEX).

Following established practice, the Board declined to issue plaintiffs licenses bearing the initials "M.D." because their diplomas read "Doctor of Osteopathy." Nevertheless, Maceluch and Glick utilize the initials "M.D." fol-

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[1] Richard Oliver was dismissed as not being a proper party plaintiff.

lowing their names in connection with their practice, in violation of Article 4590e.[2]

Plaintiffs offer three grounds for granting relief. First, they assert that certain licensing statutes and related practices violate the equal protection clause, both facially and as applied, when plaintiffs are compared to those with M.D. Licenses, or when comparing plaintiffs to graduates of foreign medical schools who obtain M.D. Licenses.

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[2] Section 3 of the Healing Art Identification Act. *Tex. Rev. Civ. Stat. Ann.* art. 4590e (Vernon) provides that:

> Sec. 3. Every person licensed to practice the healing art heretofore or hereafter by either the Texas State Board of Medical Examiners, the State Board of Dental Examiners, the Texas Board of Chiropractic Examiners, the Texas State Board of Examiners in Optometry, the State Board of Chiropody Examiners and the State Board of Naturopathic Examiners shall in the professional use of his name on any sign, pamphlet, stationery, letterhead, signature, or on any other such means of professional identification, written or printed, designate in the manner set forth in this Act the system of the healing art which he is by his license permitted to practice. The following are the legally required identifications, one of which must be used by practitioners of the healing art:
>
> (1) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Medicine: physician and/or surgeon, M.D.: doctor, M.D., doctor of medicine, M.D.
>
> (2) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Osteopathy: physician and/or surgeon, D.O.; Osteopathic physician and/or surgeon; doctor, D.O.; doctor of osteopathy; osteopath, D.O.

Second, they assert that the actions of defendants violate the Texas constitution. Third, they assert that defendants' actions violate the First Amendment, especially in light of the allegedly generic nature of the designation, "M.D."

The Court does not find any of these arguments persuasive, and grants judgment in favor of defendants, as urged by all *amicus curiae,* including not only the Texas Medical Association, but also the Texas Osteopathic Medical Association, and the American Osteopathic Association.

I.

The framework governing analysis of plaintiffs' equal protection claim was set forth in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976). There, the Supreme Court held:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. *Id.* at 303.

See also Friedman v. *Rogers,* 440 U.S. 1, 17 (1979). When fundamental rights or suspect classifications are involved, however, stricter judicial scrutiny is called for. *Id. See*

also Holt Civic Club v. *City of Tuscaloosa*, 439 U.S. 60, 70-71 (1979); *Graham* v. *Richardson*, 403 U.S. 365, 373-75 (1971).

The rational relationship standard applies here. To begin, controlling the designation under which physicians may practice is a form of economic regulation. *See, e.g. Vance* v. *Bradford*, 440 U.S. 93 (1978); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Further, the "right" to be admitted to a profession, including medicine, is not fundamental *per se* in the constitutional sense. *See Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973); *Schware* v. *Board of Bar Examiners*, 358 U.S. 232, 239 (1957); *Younger* v. *Colorado Bd. of Bar Examiners*, 625 F.2d 372, 377 n.3 (10th Cir. 1980); *Lombardi* v. *Tauro*, 470 F.2d 798, 800 (1st Cir. 1972) *cert. denied*, 412 U.S. 919 (1973); *D'Amico* v. *Board of Medical Examiners*, 11 Cal.3d 1, 113 Cal. Rptr. 786, 798, 520 P.2d 10 (Cal. 1974). *A fortiori*, the "right" to use a particular professional designation is not fundamental. *See, Bib'le* v. *Comm. of Bar Examiners*, 162 Cal. Rptr. 426, 430 (Cal. 1980).

Plaintiffs do not claim that the Constitution guarantees the right to use the "M.D." designation.[3] They argue instead that strict scrutiny should be applied when comparing plaintiffs with graduates from foreign medical schools. Plaintiffs allege foreign graduates, unlike D.O.'s, can obtain "M.D." designation despite the fact that they may

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[3] As the Supreme Court held in *San Antonio School District* v. *Rodriguez, supra*, 411 U.S. at 33-34, whether a right is considered "fundamental" depends on whether such right is "explicitly or implicitly guaranteed by the Constitution."

not have received an M.D. degree initially. Plaintiffs contend this statutory classification is based solely on alienage, and therefore creates a 'suspect classification' . . . [a] classification based on alienage is 'inherently suspect' and subject to close judicial scrutiny." Plaintiffs' Supplemental Argument and Authorities, at 4.

Assuming, arguendo, that D.O.'s who are citizens of the United States have standing to make this argument, and that a strict scrutiny standard applies, the argument nevertheless fails because the classifications are, beyond question, not based on alienage, but are based upon the locality of the education received. Substantial numbers of Americans attend medical schools abroad, just as some foreigners attend medical schools in the United States. There is no evidence in the record suggesting that foreign citizens who have attended medical schools abroad receive preferential licensing when compared with Americans who have attended medical schools abroad.[4]

Plaintiffs first attack Texas' licensing scheme on grounds that it denies equal licensing treatment to persons similarly situated. They claim the provision requiring an applicant for an M.D. license to possess an M.D. degree is facially invalid because persons receiving D.O. degrees receive the same training and education as persons granted M.D. degrees. The parties have conceded that none of the evidence before the Court indicates that D.O.'s are more or less competent to practice the healing art.

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[4] Arguably, this facially neutral classification may have a disproportionate impact on Americans. However, plaintiffs have made no attempt to show that a purpose to discriminate *against* Americans shaped the classification in use. *Cf., Personnel Administration of Mass.* v. *Feeney*, 442 U.S. 256, 272-81 (1979); *Arlington Heights* v. *Metropolitan Housing Authority*, 429 U.S. 252 (1977).

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According to the plaintiffs:

> The study of "osteopathy" began in the nineteenth century as a unique approach to the healing art, using as its basic tenet the theory that the musculoskeletal system played an integral role in the overall health of human beings, and through a system of manipulative methodology, successful treatment could be achieved.
>
> In the years since the inception of this theory, schools of osteopathy were founded relying upon this basic tenet, and shunning the use of surgery or drugs in health care.

Argument and Authorities, at 5. However, there is at present:

> . . . no substantial difference between accredited medical schools irrespective of the terminology of the degree conferred *except that students attending medical schools conferring the degree "Doctor of Osteopath" are required to take and be examined in several courses in manipulative therapy.*
>
> . . . Irrespective of the terminology of the degree conferred, all accredited medical schools have substantially the same curriculum and utilize the same texts.

Stipulations, at 2.

Yet, the Court finds there is a difference in the education received by D.O.'s and M.D.'s.

Physicians who have attended schools granting D.O. degrees, unlike those who attended schools granting M.D.

degrees, are required to take courses in "manipulative therapy." Plaintiffs themselves took courses in "manipulative therapy" or osteopathy. Oral Deposition of Dr. John Maceluch, at 11; Oral Deposition of Dr. Robert A. Glick, at 49. This difference in curriculum is reflected, generally, in a different approach to healing. As the American Osteopathic Association argued,

> It is already exceedingly difficult for a layman to make an intelligent choice of physicians. To allow physicians trained in osteopathic schools to use the designation, "M.D." would deprive a layman of one of the only methods available of differentiating between physicians. Osteopathic physicians have a unique contribution to make and offer the public a distinct option in health care.

Amicus Curiae Brief of the American Osteopathic Association, at 7.

Despite the fact that medicine is practiced within an objective scientific framework, the decisional processes of a physician reflect not only the aggregate of his substantive knowledge of clinical techniques, but also his judgment as to the need for, and nature of, treatment. That skill, borne of experience, perception of human nature, and intuitions as to what is best for a patient, jumps over the many voids in "scientific" knowledge and separates the scientist from the doctor. It follows that two schools of medicine that advocate differing approaches, even if they differ only in their advocacy of differing philosophical approaches to the same scientific realities, present a difference that a legislature may note without unlawfully discriminating against one, or preferring one over the other. The harm plaintiffs point to flows from

a public perception of these differences. The legislature has not caused these differences. It has only required that because differences exist, they be identified.

The Court finds, therefore, as the three-judge district court found in *Oliver* v. *Morton*, 361 F.Supp. 1262, 1268 (N.D.Ga. 1973) with respect to Georgia's statutory scheme prohibiting an alumnus of an osteopathic school from using the designation "M.D.," that the statutory requirement that physicians hold themselves out under the professional degree they received is a rational requirement. And whether or not plaintiffs actually use manipulative therapy in their practices does not affect the constitutionality of the statute as applied to them; the state's interest in ensuring accurate information on the schooling of physicians is enough to sustain the statute.

The second way equal protection is allegedly violated, both facially and as applied, is that graduates of foreign medical schools, who do not have degrees which read "Doctor of Medicine" or "Doctor" and which do not translate to a similar wording, can be licensed as M.D.'s while there is no procedure or means by which physicians such as plaintiffs who have received D.O. degrees may benefit from the M.D. designation.[5]

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[5] *Tex. Rev. Civ. Stat. Ann.* art. 4501b provides:

> Section 1. Notwithstanding any other provision of law, an individual who has been a student of a foreign medical school is eligible for licensure to practice medicine in this state if he has satisfied the following requirements:
>
> (1) has studied medicine in a medical school located outside the United States which is listed by the World Health Organization;

(Footnote continued on following page)

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(Footnote continued from preceding page)

(2) has completed all of the didactic work of the foreign school;

(3) has attained a score satisfactory to a medical school in the United States approved by the Liaison Committee on Medical Education on a qualifying examination and has satisfactorily completed one academic year of supervised clinical training for foreign medical students as defined by the American Medical Association Council on Medical Education under the direction of the medical school in the United States;

(4) has attained a passing score on the Educational Council for Foreign Medical Graduates examination, or other examination, if required by the State Board of Medical Examiners; and

(5) has passed the examination required by the State Board of Medical Examiners of all applicants for licensure.

In plaintiffs' supplemental brief, they argue that another reason why the existing licensing policies and procedures are unconstitutional as applied is that the great majority of foreign applicants are licensed by a method (the ECFMG screening exam followed by the FLEX exam) provided neither by law nor by rule. The Court fails to see how this would render the practices unconstitutional as applied, even if true. This other pathway is implicitly provided by Art. 4501(b) Section 3. Article 4501b was passed against the background of the established pathway from foreign medical school graduation (ECFMG—FLEX—MD). The provision in Article 4501 Section 3 that certification by the ECFMG "should not be a condition of licensure for *candidates who have completed the requirements of Section 1 of this Act*" is only an implicit acceptance or authorization of the existing pathway. *See* oral Examination of A. Bryan Spires, Jr. and Beverly Greenwood, at 71 (Spires) 80-81 (Spires).

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There are two primary methods for a student at a foreign medical school to be licensed in the United States. First, a student can take advantage of the "Fifth Pathway Program" provided by Article 4501b. This program allows a person who had completed all of the didactic (classroom) work at certain foreign medical schools, who goes on satisfactorily to complete one academic year of supervised clinical training under the direction of an American medical school, and who meets certain examination requirements to use the title "M.D." Or, as is the more typical case, the student can complete his medical education at his foreign medical school, in which case, after passing the Educational Council for Foreign Medical Graduates examination and FLEX (the examination required by the Board of all applicants for licensure), he can use the title "M.D."

The Court finds that equal protection has not been denied United States trained osteopaths by the differing licensing paths provided people who have attended foreign medical schools. The evidence shows that schools of osteopathy are virtually an American phenomenon.[6]

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[6] Plaintiff Dr. Maceluch himself knows of no schools of osteopathic medicine outside the United States, and admits that "the osteopathic form of the practice of medicine" is confined to the United States. Oral Deposition of Dr. John Maceluch, at 32. *But see* Oral Examinations of A. Bryan Spires, Jr., M.D., and Beverly Greenwood, at 40 ("I believe there is one [school of osteopathy outside the U.S.]; but I don't know where it is. We have never had an applicant from there."). "Osteopathy was born in the United States and the philosophy and techniques have been developed almost exclusively in the United States." Amicus Curiae Brief of the American Osteopathic Association, at 18. "[F]oreign physicians are not trained at osteopathic schools. . . ." Supplemental Amicus Curiae Brief of the American Osteopathic Association, at 11. *See also* Oral Examinations of A. Bryan Spires, Jr., M.D., and Beverly Greenwood, at 39-40, and 87.

There are few, if any, foreign medical students similarly situated to plaintiffs. Moreover, it does not follow that osteopaths and graduates of foreign medical schools must be treated alike simply because foreign graduates, like plaintiffs, may not have had educational backgrounds identical to those attending American medical schools granting M.D. degrees. Plaintiffs, unlike all or substantially all foreign medical students, have taken courses in manipulative therapy in an osteopathic school.[7] What sets plaintiffs apart from M.D.'s, set them apart from graduates of foreign medical schools as well.

In sum, the state has demonstrated a rational relationship between its licensing categories and debatable, if not real, differences between doctors possessing M.D. and D.O. degrees. That is all that the Constitution requires. *See Minnesota* v. *Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4113 (January 21, 1981).[8] Whether Texas' licensing designations overstate existing differences in an attempt to facilitate public awareness of the distinct osteopathic

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[7] There is no evidence of any person who attended a foreign school of osteopathy who applied for and received an "M.D." designation. *See* Oral Examinations of A. Bryan Spires, Jr., M.D. and Beverly Greenwood, at 87.

[8] In *Minnesota* v. *Clover Leaf Creamery Co.*, Justice Brennan stated for a majority of the Court:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker." *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979).

approach to the art of healing is immaterial in equal protection analysis. It is enough that the Texas Legislature "could rationally have decided" that the differences exist, and warranted a separate designation for purposes of public identification. *Id.* at 4114. Measured against this standard, Texas' licensing scheme for physicians easily withstands constitutional scrutiny.

II.

Plaintiffs also rely on Article 16, Section 31 of the Texas State Constitution to attack the Board's authority to deny them use of the M.D. designation. Section 31 provides in pertinent part:

> The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this state . . . but no preference shall ever be *given by law* to any schools of medicine. (emphasis supplied)

They assert that foreign schools of medicine are being given preference because M.D. Licenses are issued even as to those foreign graduates who did not obtain such a degree.

For the reasons earlier discussed, the Court concludes that there is no preference prohibited by Article 16, § 31. In requiring graduates of medical schools rooted in different approaches to the medical art to reflect their differences in distinctive degree designations, the legislature is not *preferring* one school over the other. That M.D.'s may command a larger following is a choice of consumers of medical services, not the legislature. That is not a preference "given by law."

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III.

Finally, plaintiffs assert that their first amendment rights are being violated by defendants in view of the allegedly generic nature of the designation, "M.D." This same argument was rejected in *Oliver* v. *Morton, supra,* 361 F. Supp. at 1270, and must be rejected here, albeit for different reasons.

In *Friedman* v. *Rogers,* 440 U.S. 1 (1979), the Supreme Court faced the constitutionality of a Texas law prohibiting the practice of optometry under a trade name, assumed name, or corporate name. The dispute arose from friction between "professional" and "commercial" optometrists. Though all optometrists were subject to the same licensing requirements and the same laws regulating their practices, they divided themselves informally into two groups based on their approaches to optometry. *Id.* at 5. The Court analyzed the constitutionality of the restrictions under the commercial speech standards enunciated in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). In that case, the Court held that restrictions on false, deceptive, and misleading commercial speech are permitted under the First Amendment. *Friedman* v. *Rogers, supra,* 440 U.S. at 9. When applied to the statute considered in *Rogers,* the Court concluded that the state's interest in protecting the public from the deceptive and misleading use of optometrical trade names was "substantial and well demonstrated" and, therefore, permissible. *Id.* at 15.[9]

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[9] *Friedman* indicates a "new willingness by the Supreme Court to defer to state legislatures in their regulation of economic ac-

(Footnote continued on following page)

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Plaintiffs urge that the term "M.D." has become so synonymous in the public mind with qualified, licensed physicians, that to prevent osteopaths from describing themselves as M.D.'s will confuse the public as to the true nature of their profession and training. Conceding that some members of the public may indeed comprehend the term M.D. to connote competent physicians, it is not irrational for the state to conclude that for plaintiffs to use the designation "M.D." would nevertheless deceive those who know the difference between doctors who received M.D. degrees and D.O. degrees. Curiously, plaintiffs emphasize numerous instances where their possession of a D.O. rather than an M.D. degree led physicians with M.D.'s to view them with suspicion. This argument only suggests a rational basis for the legislative decision. Evidently, the market cares about the distinction. Courts should not end the dissemination of information reasonably perceived by the legislature to be useful to the functioning of the market, whether the Court thinks the market is correct in any normative sense.

Plaintiffs' plight is not without appeal. The substantive content of the education and the level of clinical skills imparted to those graduating from osteopathic schools does

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tivity, even when that regulation incidentally affects commercial speech." Note, *Reuniting Commercial Speech and Due Process: The Standard for Deceptiveness in Friedman* v. *Rogers,* 57 Tex. L. Rev. 1456, 1484 (1979). "Because of the special character of commercial speech and the relative novelty of First Amendment challenges for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests." *Friedman* v. *Rogers, supra,* at 11 n.9.

not differ materially from that received by those who have graduated from schools graduating M.D.'s. Yet, osteopaths face a uniform licensing exam, and are likely to enjoy fewer financial and professional benefits from their calling. Still, the similar substantive content and skill level of osteopaths does not alter the fact that the osteopathic school which trained the plaintiffs has historically emphasized a different approach to the art of medicine. At least one solution is for the less well known D.O.'s themselves to provide the marketplace with the information necessary to make an informed choice.[10] Where the legislature has implicitly required this solution, it is not for the courts to say otherwise.

This court does not sit *de novo* as a legislative body, nor will it do so under the cloak of equal protection. A federal court decree is clean, swift, and difficult to overturn. Its powers attract those who have lost in the rough and tumble of legislative politics, but its power is undemocratic and antimajoritarian. Accordingly, the rationale for the exercise of judicial power requires, at the least, that the "constitutional" interest impinged by the legislature be one traceable to the Constitution. The Court

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[10] As the American Osteopathic Association states:

> [T]he continued use of the differing designations "D.O." and "M.D." is not only necessary to preserve the integrity of the osteopathic profession but necessary to inform the public and allow a patient to make an intelligent choice of physicians. Osteopathic medicine has a long and proud tradition and maintaining its "separate but equal" status in the ever-changing world of modern medicine is as vital to the profession as it is to the community at large. Amicus Curiae Brief of the American Osteopathic Association, at 3.

has no veto. That belongs to the governor. And saying it is the Constitution that vetoes does not make it so.

Judgment is hereby entered for defendants in all respects.

PATRICK E. HIGGINBOTHAM
United States District Judge

Petitioner's Reply Brief

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NO. 81-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. PHILIP B. EATOUGH,

Petitioner,

v.

DR. EDWIN H. ALBANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

FOREWORD

The respondents, by defining the issues, make it clear, that they seek to defend the rules, which require a physician to include in all his advertising, his *academic* degree, which indicates osteopathic or allopathic medical training. They argue that this requirement, as implemented by them, in their licensing scheme of physicians, is rationally related to a legislative state interest, by providing useful information to the public.

ARGUMENT

I. The Board's Unilateral Division of Qualified, Fully Licensed Physicians Into Two Classes Represents an Irrational Classification Serving No Legitimate Articulated State Purpose.

The Courts below have stated that it is the express legislative policy of New Jersey to recognize graduates of osteopathic medical schools as fully competent in every respect to practice medicine and surgery as are graduates of schools that grant the "M.D." degree. The respondents have conceded that "each accredited osteopathic medical school provides medical education which is equal both in substance and quality to that provided in allopathic medical schools."

Although the statute makes no distinction between graduates of osteopathic and allopathic medical schools, the respondents by their regulations and practices have created a distinction by inscribing the letters "D.O." on licenses of osteopathic graduates and "M.D." on the licenses of all others, including foreign trained physicians, who never received an "M.D." degree or any academic degree at all. The Board has not only chosen to create two classes of physicians, but they require each physician to identify himself by the initials imprinted on the license they have received. NJAC 13:35-4.1 and 6.13 ("Degree Designation" and "Advertising" rules.)

To withstand equal protection scrutiny, the Board's practice of classifying qualified physicians into two classes must bear a "rational relation to a legitimate state interest". *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 489 (1977). The Court has stated that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a

fair and substantial relationship to the object of the legislation." *Johnson v. Robison,* 415 U.S. 361, 374 (1974); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Courts have not hesitated to strike down statutes for failing to meet the rational relation test. *Oliver v. Morton,* F.Supp. 1262 (N.D.Ga. 1973).

The *Oliver* Court confronted with a licensing scheme that discriminated against osteopathic graduates in the manner identical to this case, declared the practice unconstitutional. Since the Georgia Board licensed foreign medical graduates, (FMG's) as "M.D.'s", and permitted them to hold themselves out as "M.D.'s", but refused to issue "M.D." licenses to osteopathic graduates, the Court denounced this practice as unconstitutional.

In 1981 the Circuit Court in *Missouri State Board of Registration for the Healing Arts v. Giffen,** C V 579-98 CC, held that enforcement by the State Medical Board, which required Giffen, a D.O., to designate his earned degree, and not permit him to use the title "M.D.", while permitting FMG's, who did not receive the academic degree of "M.D." to use the "M.D.", title is a violation of the Fourteenth Amendment.

Petitioner contends that the Court's holding in *Oliver,* invalidating the discrimination between FMG's and D.O.'s is directly in point, and that the distinction between M.D.'s and D.O.'s created by the New Jersey Board is unconstitutional as well.

The court's task in equal protection analysis is to determine the legitimate state interest underlying a challenged classification. The Courts refuse to accept at face value any and all purported objectives advanced in defense of the statute. *Thompson v. Gallagher,* 489 F.2d 443, 447-49, (5th Cir. 1973). The Supreme Court has laid

*Copies of the opinion have been lodged with the clerk.

down two principles. First, courts should confine themselves to the "articulated" or "stated" purposes underlying a statute and refrain from supplying imaginary bases which might conceivably justify it. *Johnson v. Robison,* 415 U.S. 361, 376 (1974). The Supreme Court has never sustained "a statute upon a supposition about the legislature's purpose in enacting it, when the asserted justification can be shown conclusively *not* to have underlain the classification in any way." *Schlesinger v. Ballard,* 419 U.S. 498, 520 (1975). Second, a purported statutory aim must be rejected if the challenged classification is a poor means of attaining it. Thus, "if upon examination it becomes clear that there is no substantial relation between the statutes and their purported objectives, this may well indicate that these objectives were not the statute's goals in the first place." *Orr v. Orr,* 440 U.S. 268, 280 (1979).

The respondents claim that the justification for the classification is (1) to publicize the physician's actual degree earned, (2) to distinguish between allopathically and osteopathically trained physicians, and (3) indicate whether a physician uses allopathic or osteopathic methods in his practice. In view of the Supreme Court's criteria, it is clear that none of these proferred goals are the actual objective of the classification scheme.

The validity of the first purported objective, to publicize the actual degree earned, is belied by the Board's treatment of FMG's. The Board issues "M.D." licenses to foreign graduates, whom the Board concedes, either have a different degree from "M.D." or who have no medical degree of any sort. An examination of this purported goal and the classification scheme requiring physicians to publicize their earned degree, when in fact FMG's are not publicizing their actual earned degree, but are using the "M.D." degree, which in fact they do not possess, requires that this purported goal be rejected in the light of *Orr v. Orr, supra.*

II. The Board's Scheme Discriminates in Favor of FMG's And Against Holders of D.O. Degrees.

One purported goal advanced by respondents to defend their classification scheme is to require physicians to publicize the actual academic degree earned. The Board claims it does not grant degrees, but only recognizes earned degrees. The Board's licensing scheme is anything but passive, since it affirmatively inscribes "M.D." on all licenses of FMG's, who in reality are not "M.D.'s." Most FMG's do not receive the academic degree of Doctor of Medicine, "M.D.", but receive a variety of titles including "Physician", "Pediatrician", and "General Therapist". In many foreign countries, graduates only receive a license to practice medicine, and in all the English speaking countries of Europe, Asia and Africa, the academic degree that is awarded is Bachelor of Medicine and Surgery, ("M.B.B.S."). Americans studying in foreign schools rarely receive the "M.D." degree, since few countries award the "M.D." degree, and Americans who study abroad and complete their clinical training in the "Fifth Pathway" program, never receive any academic degree, and even as students, they are permitted to use the "M.D." label. Yet, without exception, all FMG's are issued "M.D." licenses.

The Board's treatment of FMG's shows the classification scheme to be wholly irrational as a means of preserving the integrity of the academic degree, and this reflects the Board's double standard, selectively enforcing the "earned degree" against osteopathic graduates, while waiving it for FMG's. This is what the District Court denounced as unconstitutional in *Oliver v. Morton,* 361 F. Supp. at 1269.

III. The Board's Scheme Does Not Rationally Promote Public Knowledge Of A Physicians Training.

The second purported goal of the Board's licensing scheme is to inform the public as to whether the physician's medical education was osteopathic or allopathic. The Board treats all FMG's as allopathically trained, yet, this is contrary to the facts below. There is no evidence in the record that supports the claim that foreign medical schools are allopathic. Various Board members testified, that the Board has no information concerning the curriculum, course of study and philosophy of any foreign medical school. They presume that since the foreign schools do not claim to be osteopathic, then they must be allopathic. The foreign schools do not claim to be either allopathic or osteopathic.

Although there is nothing in the record regarding the curriculum of foreign schools, there is much in the record regarding the quality of foreign medical education. There is evidence which is supported by Congressional reports and a study completed by the Department of H.E.W., showing that most foreign medical schools are not comparable to schools in the United States that grant the "M.D." and "D.O." degrees. Many foreign medical schools are nothing but diploma mills, graduating anyone who pays the tuition, and many schools lack laboratory and clinical facilities and therefore no clinical training is provided. Some schools even require courses in acupuncture and herbal medicine, which courses are not taught here. Assuming the purported goal of issuing the "M.D." label to FMG's is to distinguish allopathic from osteopathic training, the Board's issuance of the "M.D." license to FMG's, when the Board has little or no idea of the actual medical education, is an arbitrary and irrational practice in violation of the Fourteenth Amendment.

IV. The Scheme Fails Rationally To Inform The Public About The Nature Of A Physician's Current Practice.

The third purported goal advanced by the Board, that the "M.D." and "D.O." labels inform the public concerning a physician's practice is not rationally related to its attainment. Although osteopathy plays no part in petitioner's practice, he is forced to hold himself out to the public as an osteopath. This rigid and arbitrary requirement, "without any consideration of the merits of each individual is irrational"—*Thompson v. Gallagher,* 489 F.2d 443, 449 (6th Cir. 1973).

Since the Board has no information regarding the education of FMG's, they surely lack any information regarding the kind of medical practice engaged in by them. Acupuncture and herbal medicine may constitute a large part of one's practice, yet the Board makes no attempt to publicize them. All FMG's are automatically stamped allopathic regardless of their training and practice.

In sum, the awarding of "M.D." licenses to FMG's, while denying "M.D." licenses to graduates of osteopathic schools, fails rationally to serve any of the purported goals of the classification scheme. Finding this distinction unconstitutional, necessarily invalidates the entire licensing scheme considered as a whole. In *Oliver, supra* the Court upheld the distinction between M.D.'s and D.O.'s, but found the scheme as a whole unconstitutional, because it impermissably discriminated between FMG's and D.O.'s. *Oliver v. Morton,* 361 F. Supp. at 1268-70. See also *Miller v. Carter,* 542 F.2d 1314 (7th Cir. 1977), aff'd, 434 U.S. 356 (1978). Similarly here, the unconstitutional discrimination between FMG's and holders of "D.O." degrees, standing alone, invalidates the entire licensing scheme.

V. The Board's Distinction Between M.D. and D.O. Degree Holders is Arbitrary and Irrational.

Petitioner further contends that quite apart from the Board's treatment of FMG's, the distinction between "M.D." and "D.O." degree holders is itself arbitrary and irrational, thus constituting a separate ground for invalidating the entire scheme. The case at hand is sharply distinguishable from that portion of *Oliver v. Morton, supra,* upholding the distinction between M.D.'s and D.O.'s, considered apart from the treatment of FMG's. The New Jersey Board has conceded that there is no difference between allopathy and osteopathy, and that both are equal in all respects. No such concession was made by the Georgia Board in *Oliver.* The New Jersey Board's persistence in dividing plenary physicians into two groups, in light of its concessions, constitutes an impermissible classification.

On its face, the scheme distinguishes between two classes of physicians, who are in relevant senses similarly situated. Both receive a plenary license to practice medicine and surgery, and it is conceded that the osteopathic medical schools provide education "equal in both substance and quality to that of the allopathic medical schools. The osteopathic medical curriculum includes the entire curriculum of the allopathic medical schools, and the only additional courses offered in osteopathic schools are in osteopathic manipulation, which courses are also given as electives in allopathic schools, under the title of "biomechanics". Holders of "D.O." and "M.D." degrees are equally competent in all areas of medicine and surgery, and issuing different licenses to them can only be justified if the type of care provided was in fact different. As far back as 1970 New York State acknowledged that there was no difference and has since issued only one license to all physicians

regardless of degree earned. Petitioner is also licensed in New York and his license reads "Philip B. Eatough, licensed to practice Medicine and Surgery."

Even though many M.D.'s employ manipulation in their practice they are not required by the Board's rule to so inform the public.

VI. The Board's Scheme Has The Perverse Effect of Impeding Rather than Advancing The Attainment of the Purported Objective.

All of the purpoted goals of the Board's licensing scheme can be assembled under the broad rubric of "informing the public", the aim being to improve the overall quality of health care.

There is ample evidence that many members of the public do not understand the "D.O." label and the public's ignorance of the label "D.O.", renders the scheme ineffective. The situation is worsened by the fact that the label misinforms and confuses the public. Many view the "D.O." label as indicating a lower level of competence vis-a-vis physicians with "M.D." after their names. Moreover, they do not understand that "D.O.'s" are fully qualified and competent to practice medicine.

The overall consequences of such confusion, aside from injury to the practice of particular physicians is to reduce the number of physicians perceived as qualified to provide quality health care. The AMA recognized this effect, when it recommended that all graduates of osteopathic schools be given "M.D." degrees, and they stated that it would help increase total availability of quality health care to the American people. In the AMA's view, this was necessary to combat the "discriminatory practices in professional treatment or acceptance" of D.O.'s and "to assure equal professional treatment and

opportunities for all individuals with comparable education and training." Where the scheme's use of a misunderstood and confusing label actually impedes rather than advances the goal of better public health, that scheme runs afoul of the Fourteenth Amendment. *Thompson v. Gallagher,* 489 F.2d 443, 448 (5th Cir. 1973).

SUMMARY

In sum, the Board's licensing scheme violates the Equal Protection Clause of the Fourteenth Amendment on four grounds: (a) it fails to serve any legitimate, articulated state interest; (b) it irrationally discriminates against D.O. degree holders in favor of FMG's; (c) it distinguishes between "D.O." and "M.D." degree holders in a manner irrational both on its facts and as applied; (d) it employs a classification that impedes rather than advances any conceivable state interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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